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The Confusion of Confinement Syndrome *Extended*: The Treatment of Mentally Ill Non-Criminal Criminals in New York

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THE CONFUSION OF CONFINEMENT SYNDROME *EXTENDED:* THE TREATMENT OF MENTALLY ILL "NON-CRIMINAL CRIMINALS" IN NEW YORK

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There is nothing evil save that which perverts the mind and shackles the conscience.[1]

I. INTRODUCTION

THE term "non-criminal criminal" would seem to be a non sequitor. However, it is an apt description of those persons who suffer both from mental illness and involvement in the criminal process, though they are not sentence-serving convicts. By the concurrence of those two circumstances, they are classified by the State of New York as proper inmates of a Department of Correction mental institution.

New York State has divided administrative responsibility for the institutions in which mental patients are treated between institutions run by the Department of Mental Hygiene and those run by the Department of Correction. There are 23 Mental Hygiene hospitals,[2] often called the civil state hospitals. On June 30, 1968, there were 75,081 mental patients confined in those institutions.[3] There are two Correction hospitals, Dannemora and Matteawan. These institutions are maximum security facilities. Dannemora's patient population is comprised of about 450 mentally ill convicts.[4] That institution is statutorily empowered to receive and retain only mentally ill, sentence-serving male convicts.[5] Matteawan contains 605 patients,[6] of which 537 are *unconvicted* mental patients.[7] This article concerns those 537 patients and the irrationality of the New York system that utilizes irrelevant factors to classify certain mental patients for purposes of offering inferior treatment and imposing maximum security confinement. By

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1. St. Ambrose, *HAXAEUM* 1, 31.

2. *See* N.Y. State Dep't of Mental Hygiene, Monthly Statistical Report for June 1968 at 3-5 for a listing of in-patients by institution.

3. *Id.* at 3.

4. On December 30, 1966, Dannemora reported a current patient population of 448. Letter from R.E. Herold, M.D., Director of Dannemora State Hospital, to Grant H. Morris, December 30, 1966.

5. N.Y. Corr. Law § 383(1) (McKinney 1968).

6. Letter and accompanying data from W.C. Johnston, M.D., to Grant H. Morris, May 21, 1968. Dr. Johnston's statistical survey listed 606 patients in Matteawan as of April 30, 1968, including 247 confined as incompetent to stand trial for, or not guilty of, the crime of murder. Upon re-tabulating these statistics, the author discovered only 605 patients in Matteawan, including 246 in the "murder" categories. Thus, with the pun only half intended, there appears to be one "lost" patient at Matteawan.

7. The remaining 68 patients are mentally ill "convicts" confined to Matteawan pursuant to N.Y. Corr. Law § 408 (McKinney 1968). This "convict" category includes persons adjudicated as youthful offenders, wayward minors, juvenile delinquents, as well as women prisoners and persons undergoing sentences of one year or less or convicted of misdemeanors.

implication, the article concerns thousands of other patients in other states confined under similar irrational systems.[8]

The significance of the New York problem can best be measured by comparing the average length of confinement of persons "treated" in Matteawan with the average length of confinement of patients in civil state hospitals. Almost half of the patients confined in Matteawan in August 1965 had been continuously confined there since prior to 1958.[9] Since these patients continued to be confined in Matteawan for various periods of time after August 1965, the *minimum* average (median) length of Matteawan confinement is *six to seven years.* The average length of confinement at Department of Mental Hygiene hospitals is *four months.*[10]

In 1966, the Supreme Court of the United States examined the New York system of bifurcated administrative responsibility over mental patients. In *Baxstrom v. Herold,*[11] the Court held unconstitutional a New York statute[12] which authorized the Commissioner of Mental Hygiene to administratively order the continued confinement of mentally ill convicts upon expiration of their criminal sentences. Although confinement pursuant to that statute was deemed to be a civil commitment, the statutory procedure violated the equal protection clause[13] in denying ex-convicts the possibility of jury review of the determination of mental illness which was available to all other persons civilly committed in New York,[14] and in depriving them of judicial hearings to determine dangerous mental illness, which was afforded to all other civil patients transferred into Matteawan.[15] Without making any factual determination as to whether treatment accorded patients in Department of Correction mental institutions was substantially similar to civil state hospital treatment, the Court reasoned that by splitting its mental institutional system New York State had created "functionally distinct institutions."[16]

The "function" of Department of Correction mental institutions was

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8. Norval Morris, after examining the divided institutional arrangement in Illinois, concluded "[T]hey inflict unnecessary suffering on inmates far removed from any family they may have, and . . . they provide insufficient treatment for these artificially diversified categories of 'offenders.'" Morris, *Psychiatry and the Dangerous Criminal,* 41 S. Cal. L. Rev. 514, 522-3 n.25. *See also* Commonwealth of Mass., Governor's Comm. To Study the Mass. Correctional System, Second Report 47 (1956), *cited in* Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?,* 72 Yale L.J. 853, 870 n.48 (1963); Note, *Hospitalization of Mentally Ill Criminals in Pennsylvania and New Jersey,* 110 U. Pa. L. Rev. 78 (1961).

9. Letter and accompanying data from W.C. Johnston, M.D., to Grant H. Morris, November 22, 1966.

10. N.Y. State Dep't Mental Hygiene, State Programs for the Mentally Ill and Mentally Retarded 4 (1965).

11. 383 U.S. 107 (1966).

12. N.Y. Sess. Laws 1961, Ch. 429, § 1. After the Supreme Court decision, the statute was *repealed.* N.Y. Sess. Laws 1966, ch. 891, § 1.

13. U.S. CONST. amend. XIV, § 1.

14. Pursuant to N.Y. Ment. Hy. Law § 74 (McKinney 1968), *as renumbered* and *amended* by N.Y. Sess. Laws 1964, ch. 738, § 6.

15. Pursuant to N.Y. Ment. Hy. Law § 85 (McKinney 1968).

16. Baxstrom v. Herold, 383 U.S. 107, 114 (1966).

questioned recently in an article published in the Buffalo Law Review.[17] The author examined the *Baxstrom* decision,[18] the administrative transfer of 992 ex-convict mental patients to Department of Mental Hygiene hospitals necessitated by that decision,[19] and the enactment of regressive legislation to ease the return of those patients to Department of Correction captivity.[20] That article concluded:

> The Department of Mental Hygiene had the facilities to handle over 99 per cent of the patients that it considered dangerously mentally ill. When these ex-criminal patients were integrated with other civil patients and given treatment indistinguishable from that afforded other civil patients, they responded readily. Furthermore, it is obvious that large numbers of *Baxtrom* patients labeled dangerously mentally ill and confined in Department of Correction mental institutions, were not, in fact, dangerous.[21]

It was suggested that the *Baxstrom* aftermath necessitates a re-examination of the legality and desirability of the confinement of every class of patient at Matteawan.[22] This article attempts that analysis.[23]

II. Confinement Of The Dangerously Mentally Ill Civil Patient

Prior to 1932, if a patient in a civil state hospital in New York committed a serious criminal act against the person of another patient or employee, the Department of Mental Hygiene engaged in a questionable procedure to secure the removal of the dangerous patient from its institution. The district attorney was asked to obtain a grand jury indictment, and upon its return, the patient was found to be insane and unable to stand trial. He was then transferred to Matteawan pursuant to this new classification.[24] Some district attorneys argued that in certain cases the obtaining of indictments was a "plain distortion"[25] of a

17. Morris, *The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York,* 17 Buffalo L. Rev. 651 (1968). [Hereinafter cited as *Confusion of Confinement*].

18. *Id.* at 665-7.

19. *Id.* at 670-5.

20. *Id.* at 675-8.

21. *Id.* at 673.

22. *Id.* at 665. The article itself examined two classifications of patients in Department of Correction mental institutions—mentally ill ex-convicts and mentally ill sentence-serving convicts.

23. The *Confusion of Confinement* article, together with this article, form the basis of an S.J.D. dissertation that will be submitted to the Harvard Law School under the title: *The Confinement and Treatment of Mentally Ill Persons in a Department of Correction Mental Institution: An Analysis of the New York System. See also* Morris, *"Criminality" and The Right to Treatment,* U. Ch. L. Rev. (Summer 1969).

24. Letter from Frederick W. Parsons, M.D., Commissioner of Mental Hygiene, to Hon. Samuel I. Rosenman, Counsel to the Governor, March 18, 1932; letter from Charles B. Sears, Presiding Justice, Supreme Court, Appellate Division, Fourth Department, to Hon. Franklin D. Roosevelt, Governor of the State of New York, March 22, 1932. Both letters are on file in the bill jacket of Senate Intro. No. 1608, Pr. No. 1978, N.Y. Leg. 1932, in the N.Y. St. Dep't of Education Legislative Reference Library.

25. Letter from Walter C. Newcomb, District Attorney of Erie County, to Hon.

statute which provided that an act done by a person who is insane is not a crime.[26]

On January 27, 1932, a patient in Buffalo State Hospital killed another patient.[27] The district attorney reasoned that since the act was committed by an insane person the criminal process could not justifiably be initiated.[28]

> Solely as a means of assisting the Department of Mental Hygiene out of the dilemma presented by the anomaly of our law, the Grand Jury did return an indictment, but they also specifically recommended that amendatory legislation be introduced forthwith so that future Grand Juries and the District Attorney would not be called upon to distort the laws as a means of administrative expediency.[29]

In 1932, the Mental Hygiene Law was amended to alleviate the situation. As originally enacted, the statute authorized the transfer of a patient from a civil state hospital to Matteawan if it was ascertained that he "has committed or is liable to commit an act which if committed by a sane person would constitute homicide or felonious assault, or is dangerously insane so that his presence in . . . [a civil state] hospital is dangerous to the safety of other inmates therein or officers or employees thereof."[30]

In 1953, the applicability of section 85 was extended to any patient whose presence in the civil hospital was dangerous "to the community."[31] While it may be logically impossible for a person to be dangerous to the community so long as he remained "present" in the hospital, legislative history suggests that the amendment was aimed at the patient who, though no threat to the safety of other patients or employees, had eloping tendencies and who, if he did elope, would be a danger to the community.[32]

In 1963, the statute was repealed and reenacted in a modified form.[33] The words "mentally ill" were substituted for the word "insane" but the categories of patients transferable to Matteawan as dangerous were not changed. Notice to the patient and relatives and the opportunity to demand a hearing were mandated and the use of physicians to examine the patient was substituted for court-

Franklin D. Roosevelt, Governor of the State of New York, March 16, 1932, on file in the bill jacket of Senate Intro. No. 1608, Pr. No. 1978, N.Y. Leg. 1932, in the N.Y. St. Dep't of Education Legislative Reference Library.

26. N.Y. Sess. Laws 1882, ch. 384, § 1.

27. Letter from Martin Clark to Hon. Franklin D. Roosevelt, Governor of the State of New York, March 17, 1932, on file in the bill jacket of Senate Intro. No. 1608, Pr. No. 1978, N.Y. Leg. 1932, in the N.Y. Dep't of Education Legislative Reference Library; Letter from Frederick W. Parsons, M.D., *supra* note 24. Interestingly, the letter from Charles B. Sears, *supra* note 24, states that the patient killed a guard.

28. Letter from Walter C. Newcomb, *supra* note 25.

29. *Id.*

30. N.Y. Sess. Laws 1932, ch. 574, § 1. The statute became § 83-a of the N.Y. Ment. Hy. Law. The statute was renumbered § 85 by N.Y. Sess. Laws 1933, ch. 395, § 24.

31. N.Y. Sess. Laws 1953, ch. 699, § 1.

32. N.Y. Legislative Annual 208 (1953).

33. N.Y. Sess. Laws 1963, ch. 704, §§ 1, 2.

appointed commissions.[34] The new procedures paralleled exactly those utilized for transfer from prisons to Matteawan of sentence-serving convicts alleged to be mentally ill.[35]

Mental Hygiene Law section 85(7), as enacted in 1963, provides for the emergency transfer of an alleged dangerous patient pending a hearing for transfer.[36] The circumvention of procedural safeguards through utilization of this procedure is a distinct possibility.[37] It may be assumed that once a patient has been physically transferred to Matteawan, the court that found the immediate necessity for the transfer and ordered it, will be less than likely to find that the patient was not in fact, dangerous.

Does a statute authorizing the confinement of a person who is not a convict in an institution administered by a department of correction deprive that person of liberty in violation of the due process clause[38] and fair trial[39] guarantees of the United States Constitution? Neither the Supreme Court of the United States nor the New York courts have ruled on the constitutionality of Mental Hygiene Law section 85. In related situations, however, other courts have prohibited the confinement of non-convicts in penal institutions. In *White v. Reid*,[40] the court held that it was not constitutionally permissible to confine a juvenile committed under civil or equitable proceedings in a jail, for a jail is an institution designed for the custody of those convicted of crime. It is arguable that the commitment in *White* is distinguishable from a section 85 commitment. In *White*, the petitioner was confined for the *purpose* of punishment. Persons transferred to Matteawan pursuant to section 85 are confined there as a security measure and are not being "punished" for their "dangerous" tendencies or "dangerous" acts.

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34. The Department of Mental Hygiene, in a memorandum in support of the bill stated:

> The existing provisions of these sections whereby a commission of three members is appointed by a court to examine the alleged dangerous patient and report to the court has proven very cumbersome and slow. It seems quite evident that these commissions serve no useful purpose and certainly the examination and report to the court can be made much more expeditiously and professionally competently by qualified physicians.

N.Y. Sess. Laws 1963, Legislative Memoranda, 2096.

35. N.Y. Corr. Law § 408 (McKinney 1968).

36. The Department of Mental Hygiene justified the provision by stating in its memorandum in support of the bill, "It has also proven extremely difficult administratively as well as to be detrimental to the patient for the patient to be retained in a mental hygiene institution during the pendency of the proceeding in such cases where he must necessarily because of his condition be kept in close confinement." N.Y. Sess. Laws 1963, Legislative Memoranda, 2096.

37. N.Y. Corr. Law §§ 383(7), 408(7) (McKinney 1968) are identical emergency transfer statutes that apply to allegedly mentally ill convicts. *See Confusion of Confinement*, *supra* note 17, at 663-4.

38. U.S. CONST. amend. V; XIV, § 1.

39. U.S. CONST. amend. VI; XIV, § 1.

40. 126 F. Supp. 867 (D.D.C. 1954). *Contra*, Arkadiele v. Markley, 186 F. Supp. 586 (S.D. Ind. 1960).

In *In re Maddox*,[41] petitioner was civilly committed as a criminal sexual psychopath and was transferred from a state hospital to a state penitentiary. The incarceration and restraint imposed by the prison was viewed by the doctors who prescribed the transfer as a form of treatment which had, on other occasions, helped to make obdurate criminal sexual psychopaths more ready to accept the treatment and assistance toward recovery offered by the state hospital to which they might be returned. In spite of this treatment-not-punishment purpose of the transfer, the Supreme Court of Michigan held that before penitentiary sentence or confinement could be imposed, petitioner was constitutionally entitled to a criminal trial with all its safeguards.

It may be urged that whatever the purpose of confinement, the institution to which the transfer was made in both *White* and *Maddox* was truly a penal institution, while section 85 authorizes transfer to a *hospital*, not a jail or penitentiary. Even if Matteawan is regarded solely as a hospital, and even if it offered treatment comparable in quality to the treatment offered in the civil hospitals,[42] there is still some judicial precedent prohibiting such a transfer.

In *Benton v. Reid*,[43] the United States Court of Appeals for the District of Columbia Circuit held that a chronic sufferer of communicable tuberculosis could not be confined in the hospital section of the District of Columbia jail. The statute authorized detention in "any place or institution"[44] in the District of persons who endanger the public health. On several occasions prior to the transfer, the patient had left the hospital in which he had been placed without permission. Nevertheless, the court held that grave constitutional questions would be raised if the statute were construed to permit the transfer of this civil patient to the jail hospital. The court cited the social stigma and bad associations resulting from such confinement.

White, *Maddox*, and *Benton* were all cases involving an administrative order of transfer. Do the notice and hearing provisions of section 85 insulate it from claims of unconstitutionality?

Commitment to Matteawan pursuant to section 85 is not receivable in any court as evidence of the commission of a crime, nor is the commitment deemed punishment for a crime.[45] Although no court has ruled on what procedural safeguards are necessary to satisfy due process requirements for this civil proceeding, the United States Supreme Court decision in *In re Gault*[46] signals inadequacies in the section 85 procedure. In a civil proceeding, Gault, a fifteen year old juvenile, was adjudicated "delinquent" and ordered committed to a state reformatory. The Supreme Court held that deficiencies in notice of charges,

41. 351 Mich. 358, 88 N.W.2d 470 (1958).
42. Presently, Matteawan does not appear to offer such comparable-in-quality treatment. *See Confusion of Confinement*, *supra* note 17, at 654-9.
43. 231 F.2d 780 (D.C. Cir. 1956).
44. D.C. Code Ann. § 6-119a (1967).
45. N.Y. Ment. Hy. Law § 85(5) (McKinney 1968).
46. 387 U.S. 1 (1967).

right to counsel, confrontation and cross-examination of witnesses, and the privilege against self-incrimination had denied him due process. In discussing the distinction between "civil" and "criminal" proceedings, the Court stated:

> Indeed, in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult "criminals." In those States juveniles may be placed in or transferred to adult penal institutions after having been found "delinquent" by a juvenile court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil."[47]

The Court focused its attention on the character of the sanctions that could be imposed in a delinquency proceeding and was not swayed by the "civil-not-criminal" label attached to the proceedings nor by the "rehabilitation-not-punishment" motive for the confinement.[48]

Legal writers[49] are suggesting that the influence of *Gault* will extend beyond the juvenile court system to such other "civil" commitments as alcoholism, sexual deviation, narcotics addiction, and mental illness.[50] If the procedures for civil commitment of the mentally ill are open to constitutional doubt as not providing certain criminal process safeguards, surely the section 85 procedures for transfer of civil patients to a Department of Correction institution are even more dubious. For example, if no demand is made for a hearing by or on behalf of the alleged dangerously mentally ill person, the judge may determine the issue of dangerous mental illness and issue the transfer order.[51] Can an accused criminal be sentenced to prison summarily unless he demands a hearing on the issue of guilt?

> If a hearing is demanded, section 85 provides that the judge shall hear the testimony introduced by the parties and shall examine the alleged dangerously mentally ill person, if deemed advisable in or out of court, and render a decision in writing as to such person's dangerous mental illness. If such judge cannot hear the application, he may, when fixing the date of the hearing, name some referee who shall hear the testimony and report the same forthwith, and his opinion thereon, to such judge, who shall, if satisfied with such report, render his decision accordingly.[52]

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47. In re Gault, 387 U.S. 1, 50 (1967).

48. "It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time." *Id.* at 27.

49. *E.g.*, *The Supreme Court, 1966 Term*, 81 Harv. L. Rev. 69, 174 (1967).

50. "When analysis thus focuses on the relation of sanctions to conduct, many of these systems resemble the arrangements in the juvenile process which the court has refused to tolerate. The court made casual reference to the juvenile-mental illness parallel, and its firm refusal to be bound by the civil-criminal dichotomy casts a long shadow over the conceptual device which has enabled many commitment systems to isolate themselves from procedural review." *Id.* at 174-5.

51. N.Y. Ment. Hy. Law § 85(3) (McKinney 1968).

52. N.Y. Ment. Hy. Law § 85(4) (McKinney 1968).

What of the privilege against self-incrimination? On whom does the burden of proof rest? How heavy is that burden? In a criminal prosecution, could the judge name a referee to hear the evidence instead of himself?

Section 85 authorizes a patient to be represented by counsel but does not specifically require the appointment of counsel for indigents.[53] Does the patient have a right to counsel in this hearing?[54]

If the patient is transferred to Matteawan pending the hearing on the issue of dangerous mental illness,[55] has he been unduly prejudiced in that hearing?

Additionally, the categories of patients subject to Department of Correction incarceration are so vague as to be constitutionally objectionable. The purpose of the original enactment was to prevent the initiation of the criminal process against a mentally incompetent patient who had committed an act of homicide or felonious assault. Under the existing law he may also be transferred if he is "so dangerously mentally ill" that his presence in the hospital is dangerous to the safety of others in the hospital or in the community.[56] Can a person's presence in the hospital be a danger to others if he is not liable to commit an act of homicide or felonious assault? Are the two standards distinguishable, and if so, how broad is the concept of dangerous mental illness? How may "dangerousness" be proven, and equally as important, how does a patient disprove an allegation of dangerousness? Neither the statute nor any appellate court decisions interpreting it provide a clue.

The difficulties that can be generated by the terminology of section 85 are easily demonstrated by a comparison of the title of the statute with its body. Section 85 is entitled: "Proceedings for certification to Matteawan state hospital of certain *dangerous mentally ill* patients of state hospitals in the department."[57] However, the judge in a section 85 hearing is required to "determine the question of *dangerous mental illness* of such person."[58] *Quaere*: If a person is found to be mentally ill and dangerous but his dangerousness is not related to his mental condition, is he a proper subject for transfer? He is a dangerous, mentally ill person, but he is not dangerously mentally ill.[59]

Prior to the enactment of the original transfer statute in 1932, the Commis-

53. N.Y. Ment. Hy. Law § 85(4) (McKinney 1968).

54. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); People *ex rel.* Rogers v. Stanley, 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966); *see also* discussion in text accompanying notes 281-4, *infra.*

55. Pursuant to N.Y. Ment. Hy. Law § 85(7) (McKinney 1968).

56. N.Y. Ment. Hy. Law § 85(1) (McKinney 1968).

57. N.Y. Ment. Hy. Law § 85 (McKinney 1968) (emphasis added).

58. N.Y. Ment. Hy. Law § 85(3) (McKinney 1968) (emphasis added).

59. Perhaps the drafters of the statute felt that if the person was mentally ill and dangerous but not dangerously mentally ill, he could be transferred only if it was shown that he had committed or was liable to commit an act of homicide or felonious assault. This distinction between the *dangerous* mentally ill patient and the *dangerously* mentally ill patient exists in the provision permitting the director to apply for the transfer, N.Y. Ment. Hy. Law § 85(1) (McKinney 1968), but was not transported into subsequent provisions of the statute. The judge determines only the question of dangerous mental illness and the person is labeled a dangerously mentally ill person. N.Y. Ment. Hy. Law § 85(3) (McKinney 1968).

sioner of Correction expressed his concern about the vagueness of the proposed law by stating that under it "almost any acutely maniacal patient, or patient suffering from delusions, paranoia, etc., could be transferred from a civil hospital to the Matteawan State Hospital."[60] Ironically, he expressed the opinion that unless modified, this *dangerous* patient transfer legislation "would be an exceedingly *dangerous* measure."[61] The Commissioner's solution to the ease-of-transfer problem was to empower him to administratively disapprove any such transfer. Legislation enabling the Commissioner of Correction to reject these section 85 patients was never enacted.[62]

In recent years there has been a shift of concern from which patients should be transferred *into* Matteawan to which patients should be transferred *out*. A person transferred to Matteawan pursuant to Mental Hygiene Law section 85 was required to be retained there until he was "no longer dangerous to safety whereupon he may be released as provided in the correction law or he may be transferred to any hospital in the department [of Mental Hygiene] upon the order of the commissioner [of Mental Hygiene]."[63] Prior to 1965, there was no specific statute in the Correction Law for the release of non-convict patients. At that time, the Matteawan discharge statute, section 409 of the New York Correction Law, dealt only with release of mentally ill prisoners at the expiration of their sentences. Also, the Superintendent of Matteawan, Dr. W.C. Johnston, was concerned that the Department of Mental Hygiene, which had the duty to retransfer to civil hospitals those patients who were no longer dangerous, simply refused to do so.[64] Section 409 was amended in 1965 to authorize the director[65] of Matteawan to release non-prisoner[66] patients who had recovered, or who, if still mentally ill, were reasonably safe to be at large. Thus if the Department of Mental Hygiene refused to retransfer a patient, the patient could be released from Matteawan even though he was still mentally ill. However, Dr. Johnston did not exercise this release authority.

In 1966, New York Mental Hygiene Law section 85 was amended to limit

60. Letter from Walter N. Thayer, Jr., Commissioner of Correction, to Hon. Samuel I. Rosenman, Counsel to the Governor, March 19, 1932, on file in the bill jacket of Senate Intro. No. 1608, Pr. No. 1978, N.Y. Leg. 1932, in the N.Y. St. Dep't of Education Legislative Reference Library.

61. *Id.* (emphasis added).

62. Considering the obvious constitutional hurdles facing § 85, it is rather surprising that the New York Legislature so readily applied its provisions to ex-convict patients through the enactment of N.Y. Sess. Laws 1966, ch. 891, § 4, thus creating new objections to the statute. *See Confusion of Confinement, supra* note 17, at 675-8.

63. N.Y. Sess. Laws 1963, ch. 704, § 2.

64. In a conference at Matteawan State Hospital, March 18, 1965, Dr. W. C. Johnston stated that the Department of Mental Hygiene refused to accept patients from Matteawan in the age bracket of 18 to 45, and consequently, "Section 85 is the Kiss of Death."

65. Although the word "director" is utilized in N.Y. Corr. Law § 409 (McKinney 1968), there is technically no director of Matteawan. N.Y. Corr. Law § 402 (McKinney 1968) refers to the appointment of a "superintendent," who, according to N.Y. Corr. Law § 405 (McKinney 1968) is the chief executive officer of the hospital.

66. The word "non-prisoner" as used in the amended section 409 meant certain non-sentence-serving patients including those transferred into Matteawan as dangerously mentally ill pursuant to N.Y. Ment. Hy. Law § 85 (McKinney 1968).

to six months the original period of detention in Matteawan of persons transferred as dangerously mentally ill. Thereafter the director of Matteawan could apply for further periods of detention.[67] Of the 210 patients transferred into Matteawan pursuant to section 85 who still remained there, Dr. Johnston chose to request orders of retention for only 74.[68] The other 136 patients were transferred virtually en masse to the Department of Mental Hygiene.[69] Unless overnight 136 dangerous mental patients were miraculously cured of their dangerousness, it may be safely assumed that 62 percent of the patients then confined in Matteawan pursuant to section 85 were not, in fact, dangerous.[70]

III. Confinement of Persons Acquitted of Crimes by Reason of Insanity

In 1881, the New York Legislature enacted the New York Code of Criminal Procedure.[71] Section 454 of that code provided, in its entirety:

> When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court must, thereupon, if the defendant be in custody, and they [72] deem his discharge dangerous to the public peace or safety order him to be committed to the state lunatic asylum, until he becomes sane.[73]

When the statute was enacted, Matteawan did not exist.[74] "The State Lunatic Asylum" mentioned in section 454 as the proper place of confinement of this classification of patient apparently referred to the original state hospital for the civilly committed mentally ill at Utica, New York, which had been specifically named: "The State Lunatic Asylum."[75] Nevertheless, with the creation of Matteawan, persons ordered confined pursuant to section 454 were committed to Matteawan.

67. N.Y. Sess. Laws 1966, ch. 891, §§ 2, 3. N.Y. Ment. Hy. Law § 85 (4-a) (McKinney 1968) authorizes the director of Matteawan to apply initially for a 6 month period of retention, the next for up to one year, and subsequent applications for up to two years. The periods of retention correspond to those for patients in civil hospitals, pursuant to N.Y. Ment. Hy. Law § 73 (McKinney 1968).

68. Letter from W. C. Johnston, M.D., to Grant H. Morris, November 22, 1966; Letter from C. Stamatovich, M.D., to Grant H. Morris, January 25, 1967. As of April 30, 1968, there were 82 patients in the section 85 category. Letter from W. C. Johnston, M.D., to Grant H. Morris, May 21, 1968.

69. Letter from C. Stamatovich, M.D., to Grant H. Morris, January 25, 1967.

70. The directors of the civil hospitals resisted the return of these ex-dangerously mentally ill cases. *See Confusion of Confinement, supra* note 17, at 674-5.

71. N.Y. Sess. Laws 1881, ch. 442.

72. In People *ex rel.* Peabody v. Chanler, 133 App. Div. 159, 172, 117 N.Y.S. 322, 331 (2d Dep't) *aff'd*, 196 N.Y. 525, 89 N.E. 1109 (1909), J. Rich, concurring explained that the word "they" refers to the court and not the jury. The statute was adopted at a time when the Court of Oyer and Terminer—composed of three judges—was in existence.

73. N.Y. Sess. Laws 1881, ch. 442.

74. Money was not appropriated for the construction of Matteawan until 1888. N.Y. Sess. Laws 1888, ch. 45.

75. N.Y. Sess. Laws 1836, ch. 82; N.Y. Sess. Laws 1842, ch. 135, § 1. Note, however, that legislation in 1858 had established a "State Lunatic Asylum for Insane Convicts" which

In 1910, the mother of a section 454 patient sought transfer of her son from Matteawan to a civil state hospital. The Appellate Division of the New York Supreme Court, reversing the lower court, held that the court had no power to make such a transfer.[76] The appellate court reasoned that although section 454 merely authorized commitment to the "State Lunatic Asylum," the Insanity Law specifically designated Matteawan as the exclusive place for the commitment. Under the Insanity Law as it then existed, the civil hospitals were for the poor and indigent insane, and where there was room, for other residents of the state,[77] while Matteawan was designated as the institution "used for the custody and care of the insane committed to it by courts of criminal jurisdiction . . . ."[78] In refusing the transfer, the court noted that although the Insanity Law[79] authorized transfers from civil hospitals to Matteawan, "the law is silent on the subject of transfers from Matteawan."[80]

Interestingly, in an earlier case involving the same patient, the same appellate court, in upholding the constitutionality of section 454, stated, "Such a commitment is not for the punishment of such a defendant, for there can be no punishment for him who has been acquitted . . . ."[81] In that earlier case, the court was only faced with the issue of whether commitment to *any* institution (without notice and hearing) is permissible upon an acquittal by reason of insanity.

In the subsequent case, the court ruled that the constitutionality of section 454 had already been established, and it did not consider the issue of whether the statute, in authorizing the confinement of the non-criminal section 454 patient in *Matteawan*, violated the United States Constitution. The same arguments that were discussed previously in this article in relation to Mental Hygiene Law section 85 patients should have been considered as they relate to Code of Criminal Procedure section 454 patients.[82] Perhaps the issue was not precisely defined for the court, since in 1910 neither the Department of Mental Hygiene nor the Department of Correction had yet been created.[83]

In 1960, section 454 was amended and a mandatory commitment provision

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was renamed the "State Lunatic Asylum for Insane Criminals, at Auburn" in 1869. The 1869 legislation specifically authorized the confinement in the Auburn Asylum of insane persons acquitted of arson, murder, or attempt at murder. N.Y. Sess. Laws 1858, ch. 130; N.Y. Sess. Laws 1869, ch. 895, § 1.

76. *In re* Thaw, 138 App. Div. 91, 122 N.Y.S. 970 (2d Dep't 1910).

77. N.Y. Sess. Laws 1896, ch. 545, § 30.

78. *In re* Thaw, 138 App. Div. 91, 93, 122 N.Y.S. 970, 972 (2d Dep't 1910); N.Y. Sess. Laws 1896, ch. 545, § 90.

79. *See, e.g.*, N.Y. Sess. Laws 1896, ch. 545, § 101.

80. *In re* Thaw, 138 App. Div. 91, 94, 122 N.Y.S. 970, 972 (2d Dep't 1910).

81. People *ex rel.* Peabody v. Chanler, 133 App. Div. 159, 162, 117 N.Y.S. 322, 325 (2d Dep't), *aff'd*, 196 N.Y. 525, 89 N.E. 1109 (1909).

82. *See* text accompanying notes 38-44, *supra*.

83. However, even at that date there were differences between Matteawan and the civil hospitals. For example, the Superintendent of State Prisons appointed the medical superintendent of Matteawan and made by-laws and regulations for the governing of that hospital. N.Y. Sess. Laws 1896, ch. 545, § 91.

was enacted.[84] If the defense is insanity[85] and the jury acquits on that ground, the court is *required* to "order the defendant to be committed to the custody of the commissioner of mental hygiene to be placed in an appropriate institution in the state department of mental hygiene or the state department of correction which has been approved by the heads of such department (*sic*) . . . ."[86] At any time during the period of commitment, the Commissioner of Mental Hygiene is statutorily empowered to transfer the patient between the civil state hospitals and Matteawan.[87]

Confinement in a mental hospital—even a civil hospital—has been held to be as great a deprivation of liberty as imprisonment in a jail or prison.[88] Does a mandatory commitment statute afford the necessary due process of law to deprive of his liberty, a person acquitted of a crime by reason of insanity? The New York Court of Appeals has recently stated: "We see no reason why a man who has himself asserted that he was insane at the time the crime was committed *and has convinced the jury thereof*, should not in his own interest and for the protection of the public be forthwith committed . . . ."[89]

There is an obvious reason. In a criminal prosecution, there is a presumption that the defendant was sane at the time of the commission of the crime charged against him. The initial burden of going forward with evidence on the issue of criminal irresponsibility is on the accused. This burden is discharged when sufficient evidence of irresponsibility is introduced into the case to create a jury question.[90] Once the presumption of sanity is rebutted, the prosecution must prove beyond a reasonable doubt[91] that the defendant was not insane. Thus, a verdict of not guilty by reason of insanity does not mean that the jury found the defendant to have been insane, but only that the state did not satisfy its burden of proof on the issue.[92] The apparent use of a presumption of continuing insanity

84. N.Y. Sess. Laws 1960, ch. 550, § 1.

85. In 1967, the statute was amended to conform it to the terminology of the newly recodified Penal Law, § 30.05. The words "mental disease or defect" were substituted for the word "insanity" in § 454(1). N.Y. Sess. Laws 1967, ch. 681, § 58. However, the title to § 454 was unaltered and still refers to acquittal "on the ground of insanity." N.Y. Code Crim. Proc. § 454 (McKinney 1968).

86. N.Y. Code Crim. Proc. § 454 (McKinney 1968). In 1963, § 454 was amended by the insertion of provisions relating to the detention of the "defendant" pending the approval or designation of the institution in which the "defendant" is to be placed. In New York City, the Department of Correction temporarily holds the "defendant"; outside of New York City, the sheriff of the county in which the court is located has this responsibility. N.Y. Sess. Laws 1963, ch. 527, § 1. This 1963 legislation also altered the word "departments" to "department" so that the statute now absurdly provides that the patient is committed to an institution "approved by the *heads* of such *department* . . ." (Emphasis added.)

87. N.Y. Code Crim. Proc. § 454(6) (McKinney 1968).

88. Barry v. Hall, 98 F.2d 222, 225 (D.C. Cir. 1938).

89. People v. Lally, 19 N.Y.2d 27, 33, 224 N.E.2d 87, 91, 277 N.Y.2d 654, 659 (1966).

90. American Bar Foundation, The Mentally Disabled and the Law 349 (F. Lindman & D. McIntyre, ed. 1961).

91. N.Y. Penal Law §§ 25.00(1), 30.05(2) (McKinney 1968).

92. People v. Egnor, 175 N.Y. 419, 67 N.E. 906 (1903); *see* Note, *Federal Commitment of Defendants Found Not Guilty by Reason of Insanity—Proposed Legislation*, 52 Iowa L. Rev. 930, 938 (1967).

arising from a verdict of not guilty by reason of insanity is not justified where, as here, there has been no finding of insanity at any time.[93]

In *Bolton v. Harris*,[94] the Court of Appeals for the District of Columbia, in construing the District's mandatory commitment statute,[95] recognized the limitations of a verdict of not guilty by reason of insanity. Chief Judge Bazelon in writing the court's opinion, relied on *Baxstrom v. Herold*[96] for the principle that "the commission of criminal acts does not give rise to a presumption of dangerousness which, standing alone, justifies substantial difference in commitment procedures and confinement conditions for the mentally ill."[97] Thus, to commit to a mental hospital a person found not guilty of a crime by reason of insanity without affording him the procedural safeguards established under the civil commitment scheme[98] constituted a denial of equal protection of the laws.[99] The court rejected the argument, also rejected previously by the Supreme Court in *Baxstrom*, that expeditious commitment of "non-criminal criminals" is somehow justified because of the dangerous or criminal propensities of the individual involved.[100]

In *Specht v. Patterson*,[101] the United States Supreme Court held that a person convicted under Colorado law of a sex crime[102] (maximum sentence 10 years) could not be sentenced under the Colorado Sex Offenders Act[103] (sentence of one

93. Note, *Federal Commitment of Defendants Found Not Guilty by Reason of Insanity —Proposed Legislation*, 52 Iowa L. Rev. 930, 940 (1967). The author raises and disposes of other arguments in support of mandatory commitment and concludes, "Thus, it is difficult to find anything in the criminal trial that satisfies the requirement of due process necessary for commitment." *Id.*

94. 395 F.2d 642 (D.C. Cir. 1968).

95. D.C. Code Ann. § 24-301(d) (1967).

96. 383 U.S. 107 (1966). *See* discussion in text accompanying notes 11-16, *supra*; *see also Confusion of Confinement*, *supra* note 17 at 665-7.

97. Bolton v. Harris, 395 F.2d 642, 647 (1968).

98. D.C. Code Ann. §§ 21-541 to 21-545 (1967) require a judicial hearing and determination of the person's present mental condition and place on the government the burden of proof on the issue of commitability. D.C. Code Ann. § 21-548 (1967) requires the hospital to examine a civilly committed patient at least once every six months and if the chief of service determines that the conditions which justified the involuntary hospitalization no longer exist, to release him.

99. In Cameron v. Mullen, 387 F.2d 193 (D.C. Cir. 1967), the court reached a similar result in construing D.C. Code Ann. § 24-301(a) (1967). The court held that the statute which permits confinement of mentally ill defendants "prior to the imposition of sentence" could not be utilized to confine a person who had not raised the defense of insanity but who had been found not guilty of the crime by reason of insanity. The government must institute civil commitment proceedings to confine such a person. Previously, the United States Supreme Court had decided that the District of Columbia mandatory commitment statute, D.C. Code Ann. § 24-301(d) (1967), was applicable only to those defendants who affirmatively relied on the defense of insanity and who were acquitted on that ground. Lynch v. Overholser, 369 U.S. 705 (1962).

100. Bolton v. Harris, 395 F.2d 642, 647 (D.C. Cir. 1968). *See also* Cameron v. Mullen, 387 F.2d 193 (D.C. Cir. 1967); Engelberg, *Pre-Trial Criminal Commitment to Mental Institutions: The Procedure in Massachusetts and Suggested Reforms*, 17 Cath. L. Rev. 163, 197 (1967).

101. 386 U.S. 605 (1967).

102. Colo. Rev. Stat. Ann. § 40-2-32 (1963). Defendant was convicted of taking indecent and improper liberties with a child under sixteen years of age.

103. Colo. Rev. Stat. Ann. § 39-19-1 to 10 (1963).

day to life) without a full hearing. The imposition of the indeterminate sentence required a new finding of fact, *i.e.*, that the defendant constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill,[104] which was not an ingredient of the offense charged at trial.

Relying on *Specht*, the court of appeals in *Bolton v. Harris* found the District of Columbia mandatory commitment statute to be constitutionally suspect for failing to provide a hearing on the issue of *present* mental condition. The trial that resulted in a verdict of acquittal by reason of insanity determined only that there was a reasonable doubt as to defendant's sanity in the *past*, at the time of the criminal act.

To uphold the constitutionality of the mandatory commitment statute, the court stated that persons acquitted by reason of insanity may be handled differently from civilly committed persons to the extent that there are relevant differences between the two groups. The jury's finding of a reasonable doubt as to defendant's sanity at the time of the crime was held to warrant the commitment of the person, without a hearing, for further examination to determine present mental condition.[105] *Quaere:* Suppose the defendant pleads not guilty and not guilty by reason of insanity. If the jury acquits the defendant as not guilty, may he be detained for observation and a determination of civil commitability? By merely *raising* the issue of insanity at the time of the crime, has defendant provided the government with "sufficient warrant for further examination?"

The New York Court of Appeals recently upheld the constitutionality of Code of Criminal Procedure section 454. In *People v. Lally*,[106] the court said that the mandatory commitment statute did not offend the equal protection principle of *Baxstrom v. Herold*[107] since there is a reasonable basis for distinguishing between other involuntary civil patients and a person who has been found not guilty of a crime by reason of insanity on his own plea to that effect.[108] However, the court limited the "special consideration" given to this classification of patient to a commitment for purpose of mental examination as to present mental condition. The court "amended" section 454 by holding[109] that "the spirit if not the express language of the *Baxstrom* decision"[110] requires that before the acquitted defendant can be confined in Matteawan he must be accorded all the protections given to persons involuntarily civilly committed[111] including a separate Mental Hygiene Law section 85 determination that he is dangerously mentally ill.[112]

104. Colo. Rev. Stat. Ann. § 39-19-1 (1963).

105. Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968). In so ruling, the court modified its earlier decision in Ragsdale v. Overholser, 281 F.2d 943 (D.C. Cir. 1960).

106. 19 N.Y.2d 27, 277 N.Y.S.2d 654, 224 N.E.2d 87 (1966).

107. 383 U.S. 107 (1966).

108. People v. Lally, 19 N.Y.2d 27, 34, 277 N.Y.S.2d 654, 660, 224 N.E.2d 87, 91 (1966).

109. *Id.* at 35, 277 N.Y.S.2d at 660, 224 N.E.2d at 92. *See* note 112, *infra.*

110. *Id.*

111. Involuntary civil patients may obtain a hearing to review an order of commitment or retention pursuant to N.Y. Ment. Hy. Law § 74 (McKinney 1968).

112. In both Bolton v. Harris, 395 F.2d 642, 650 (D.C. Cir. 1968) and Cameron

To uphold the validity of section 454, the New York Court of Appeals placed reliance on *Lynch v. Overholser*[113] and *People ex rel. Peabody v. Chanler*.[114] In both instances, the reliance was unjustified.

The issue before the United States Supreme Court in *Lynch* was whether one could be confined pursuant to a mandatory commitment statute[115] when at trial he neither claimed nor presented any evidence that he had been insane at the time the offenses were committed. The Supreme Court held that he could not be so committed. Justice Clark, in dissenting,[116] specifically berated the majority for not reaching the constitutional issue of whether a mandatory commitment statute violates due process.

The issue before the appellate court in the *Peabody* case, decided in 1909, was whether the judge's-discretion commitment statute, then in existence, violated due process.[117] To uphold the constitutionality of that statute, the court reasoned:

> As such commitment is not a matter of course, but may be made only by that court, and only of a defendant in detention whom the court deems dangerous to the public peace and safety if discharged, and the commitment lasts only until the defendant becomes sane, we must infer that the Legislature intended that the court would commit only after its conclusion that at the time of acquittal the defendant was insane so as to be a menace to the public peace and safety.[118]

In *Lally*, the New York Court of Appeals apparently disregarded the fact that the 1960 amendments to section 454[119] altered it drastically from a *discretionary* commitment statute to a *mandatory* commitment statute.[120]

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v. Mullen, 387 F.2d 193, 201 (D.C. Cir. 1967) the Circuit Court of Appeals for the District of Columbia expressly rebuked the New York Court of Appeals for "saying" that the statute did not offend the equal protection clause but "holding" that the statute was judicially amended to provide the safeguards of N.Y. Ment. Hy. Law §§ 74, 85 (McKinney 1968). Perhaps the District of Columbia court overlooked the distinction, made by the New York Court of Appeals, between confinement of persons found not guilty of crimes by reason of insanity solely to determine present mental condition for possible civil commitment, which was held not to offend equal protection, and civil commitment itself, which was held to offend equal protection if the § 74 and § 85 procedures are not accorded. It is precisely this same distinction which the District of Columbia court made in Bolton v. Harris, *supra*.

113. 369 U.S. 705 (1962).

114. 133 App. Div. 159, 117 N.Y.S. 322 (2d Dep't), *aff'd*, 196 N.Y. 525, 89 N.E. 1109 (1909).

115. D.C. Code Ann. § 24-301(d) (1967).

116. Lynch v. Overholser, 369 U.S. 705, 720 (1962). Justice Clark characterized the Court's failure to reach the constitutional issue as a "disingenuous evasion." 369 U.S. at 733.

117. *See* discussion in text accompanying note 81, *supra*.

118. People *ex rel.* Peabody v. Chanler, 133 App. Div. 159, 160, 117 N.Y.S. 322, 323 (2d Dep't), *aff'd*, 196 N.Y. 525, 89 N.E. 1109 (1909).

119. *See* discussion in text accompanying notes 84-7, *supra*.

120. Pursuant to N.Y. Code Crim. Proc. § 454(1) (McKinney 1968) a person acquitted by reason of insanity is automatically committed to the custody of Commissioner of Mental Hygiene to be placed in a civil state hospital or Matteawan. In ignoring the significant change in the statute, the court stated:

"Subdivision (1) of section 454 is, as we have said, an old statute which was held constitutional in 1909 in People ex rel. Peabody v. Chanler . . . . The arguments against present subdivision (1) were rejected in the *Peabody* case." People v. Lally, 19 N.Y.2d 27, 32, 277 N.Y.S.2d 656, 658, 224 N.E.2d 87, 90 (1966).

The court also noted the similarity of section 454 to the District of Columbia mandatory commitment statute[121] and utilized a previously decided District of Columbia case[122] which upheld the constitutionality of the District statute, as persuasive to the New York situation. The opinion of the Court of Appeals for the District of Columbia in *Bolton v. Harris*,[123] a case decided after *Lally*, modified the effect of the District of Columbia decision relied on in *Lally*.[124]

Assuming, *arguendo*,[125] that the District of Columbia statute remains constitutionally viable, the issue presented by the plight of Sylvester Lally and others similarly situated in the State of New York differs from the District of Columbia situation. In the District of Columbia, *all* mental patients, whether civilly or "criminally" committed, are confined in the one mental hospital in the District, *i.e.*, St. Elizabeth's Hospital. In New York, section 454(1) authorizes commitment to an institution within the jurisdiction of the Department of Correction, *i.e.*, Matteawan. Although the New York court held that before a person acquitted of a crime by reason of insanity can be committed to Matteawan, he is entitled to the procedural safeguards of Mental Hygiene Law section 85, the court did not consider the more important issue (discussed earlier in this article)[126] of whether any person who is not a sentence-serving convict can *ever* be legally confined in an institution administered by the Department of Correction.

Additionally, the court's decision in *Lally* suffers from another deficiency.[127] All "truly" civil mental patients are initially admitted to civil state hospitals and can be transferred to Matteawan (pursuant to section 85) only upon a showing of dangerousness exhibited at the civil institution. Arguably, it is a denial of equal protection of the laws to authorize the deprivation of initial civil hospital treatment to those persons acquitted by reason of insanity who are specially categorized "civil" patients and who have not exhibited dangerousness while confined in a civil mental hospital.[128]

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121. D.C. Code Ann. § 24-301(d) (1967).
122. Ragsdale v. Overholser, 281 F.2d 943 (D.C. Cir. 1960).
123. 395 F.2d 642 (D.C. Cir. 1968).
124. *See generally* discussion in text accompanying notes 94-105, *supra*.
125. *See generally* discussion in text accompanying notes 88-93, *supra*, for the argument that mandatory commitment statutes are unconstitutional as violative of due process. *See also* discussion in text accompanying notes 94-105, *supra*, for the argument that mandatory commitment statutes may be violative of the equal protection clause of the United States Constitution.
126. *See* text accompanying notes 38-51, *supra*.
127. *See Confusion of Confinement*, *supra* note 17 at 675-8 for an argument that a recent New York statute which authorizes initial commitment of mentally-ill ex-convicts in Matteawan is similarly defective.
128. In the case of a person found not guilty of a crime by reason of insanity, if the determination that he is *dangerously* mentally ill and commitable to a Department of Correction institution is based in whole or part on his commission of the criminal act, then isn't he being punished for a crime he was found not guilty of committing?

Ironically, New Hampshire, which judicially adopted the forward looking product-of-mental disease test of insanity in 1871, State v. Jones, 50 N.H. 369 (1871), has enacted a

In holding that section 454 *requires*[129] that in every case a defendant acquitted of a crime by reason of insanity be examined for possible civil commitment before being returned to society, the New York Court of Appeals may have erred. Although the District of Columbia Court of Appeals made a similar decision in *Bolton v. Harris*,[130] in that case there was some justification for such a holding, since the District civil commitment statute[131] uses a "dangerousness" standard for commitability. A person may be civilly committed in the District of Columbia only if he is "mentally ill, and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty."[132] A verdict of not guilty by reason of insanity can arguably[133] be utilized to indicate that the person *prima facie* meets the requirements for commitment, namely illness and dangerousness, and that he should be examined further as to these requirements. However, in New York the standard for civil commitment requires a finding that the person be mentally ill and "in need of care and treatment."[134] Does a finding in a criminal trial that the defendant has committed a "dangerous" act in the past necessarily give any *indicia* of his present need for institutional care and treatment? Ironically, the verdict may tend to show "dangerous" mental illness which might justify commitment to Matteawan rather than to a civil hospital—except that *Baxstrom* will not allow such a finding to be made without an initial determination that the person was civilly commitable. Arguably, there is no legitimate basis in New York for holding the person for an examination as to civil commitability. Contrarily, it may be contended that "dangerous" persons who are mentally ill are necessarily included within a broader category of persons in need of institutional care and treatment. *Quaere:* When, pursuant to the New York civil commitment statute, physicians certify that a person is mentally ill and in need of institutional care and treatment, are they, and should they, be basing their decisions on knowledge of prior dangerous acts committed by the person, or rather, on considerations of treatment available in the institutional setting for the patient's mental condition?

In "re-writing"[135] section 454 so as to include all the protections of sections 74[136] and 85 of the Mental Hygiene Law available to other civil mental

statute authorizing a court to commit a person found not guilty by reason of insanity "to the prison or to the state hospital" if it is of the opinion that it would be dangerous for such person to go at large. N.H. Rev. Stat. Ann. § 607:3 (1967). A Vermont statute contains a similar provision. Vt. St. Ann. T. 13 § 4805 (1968).

129. People v. Lally, 19 N.Y.2d 27, 34, 277 N.Y.S.2d 654, 660, 224 N.E.2d 87, 91 (1966).

130. 395 F.2d 642 (D.C. Cir. 1968).

131. D.C. Code Ann. § 21-545 (1967).

132. *Id.*

133. *But see* text accompanying note 105, *supra.*

134. N.Y. Ment. Hy. Law § 72(1)(3) (McKinney 1968).

135. In Cameron v. Mullen, 387 F.2d 193 (D.C. Cir. 1967), Judge Bazelon characterized the decision of the New York Court of Appeals in People v. Lally, 19 N.Y.2d 27, 277 N.Y.S.2d 654, 224 N.E.2d 87 (1966) as "amending" the statute. Cameron v. Mullen, *supra* at 201.

136. Pursuant to N.Y. Ment. Hy. Law § 74 (McKinney 1968) an involuntary civil

patients, the New York Court of Appeals has created new unanswered problems. One authoritative study[137] has suggested that section 454 as construed in *Lally* establishes the following procedures:

> (a) The acquitted defendant is still automatically committed to the custody of the Commissioner of Mental Hygiene for an indefinite period.
>
> (b) If the Commissioner wishes to hospitalize the patient at Matteawan, (i) he must first initiate a proceeding under section 85, and (ii) the patient is entitled to challenge the result of that proceeding at a jury trial under section 74, and (iii) if he again is unsuccessful, the patient, while at Matteawan, is entitled to automatic periodic judicial review of his condition (and subsequent jury trial review on each occasion) under sections 73 and 74 (as is expressly provided in section 85), and (iv) is also entitled at any time to seek release by a section 454 application (which may also be subject to jury trial review).
>
> (c) If the Commissioner initially chooses to place the patient in a civil state hospital, (i) the patient may apply for his release under the procedures set forth in section 454, and (ii) he is entitled to a jury trial review of an adverse decision under section 74 (as read into section 454), but (iii) neither on its face nor as construed by the Court of Appeals does section 454 grant automatic periodic judicial review (under section 73) to the acquitted defendant who is not processed under section 85.[138]

Thus the right to automatic review is secured to some acquitted defendants, but not to all.

The *Lally* decision has also propagated this problem. Section 454(5) authorizes a person committed pursuant to the statute to apply to the court for his release or discharge. If the court is satisfied, either with or without a hearing, that the person can be discharged or *released on condition* "without danger to himself or others," the court is required to order his discharge.[139] While this subdivision would seem to obviate the need for habeas corpus, the New York Court of Appeals held that in addition to the statutory remedy, a confined person can always challenge the validity of his continued detention by alleging in a writ of habeas corpus that he is not in fact insane.[140] This curious ruling leaves unanswered the question of whether the court may place conditions on the release of a person who successfully uses the

patient may obtain a hearing to review the court order authorizing his retention in the civil state hospital.

137. Association of the Bar of the City of New York and Fordham Law School, Mental Illness, Due Process and the Criminal Defendant (1968) [hereinafter cited as Bar Report].

138. *Id.* at 135.

139. N.Y. Code Crim. Proc. § 454(3) (McKinney 1968).

140. People v. Lally, 19 N.Y.2d 27, 33, 277 N.Y.S.2d 654, 659, 224 N.E.2d 87, 91 (1966).

habeas corpus route rather than the application for discharge route.[141] This question may be of major significance in that if a person is conditionally released pursuant to the terms of section 454, the conditions that can be imposed are any that the court determines to be necessary.[142]

Similarly unanswered is the query of what standard for release should be applied to a person who is "civilly" committed after an acquittal by reason of insanity. Is he to be released if his mental condition improves to the extent required by the provisions of the discharge statute applicable to other civil patients,[143] or only if he meets the more stringent requirement of section 454?[144] Seemingly, release pursuant to section 454 is not dependent upon improvement in the patient's mental condition. According to the wording of the statute, a person who has recovered from his mental condition or who is not mentally ill—sufficient grounds for discharge of other civil patients—may still be retained in the institution if he is a "danger" to himself or others.[145]

If the section 454 release standard is utilized for a patient "civilly" committed after an acquittal by reason of insanity, then this so-called civil patient may also be subject to the following provision of section 454:

> If, within five years after the conditional release of a committed person, the court shall determine, after a hearing, that for the safety of such person or the safety of others his conditional release should be revoked, the court shall forthwith order him recommitted to the custody of the commissioner of mental hygiene . . . .[146]

Since no other civil patients are recommitted through such a procedure, there is an obvious violation of the equal protection clause. Nevertheless, in *Lally* the court apparently accepted the view that the section 454 release standard applies to these "civil" patients when it stated, "The issues there to be tried are whether appellant may be discharged or released without danger to himself or others . . . ."[147]

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141. It also raises the question as to whether other classifications of mental patients may circumvent the judicial procedures required by other statutes, and obtain immediate release through the writ of habeas corpus.

142. N.Y. Code Crim. Proc. § 454(3) (McKinney 1968).

143. N.Y. Ment. Hy. Law § 87(1) (McKinney 1968) authorizes the director of a civil hospital to discharge:

a. A patient who, in his judgment, is recovered.

b. A patient who, in his opinion, is not mentally ill.

c. Any patient who is not recovered but whose discharge, in the judgment of the director, will not be detrimental to the public welfare or injurious to the patient.

144. N.Y. Code Crim. Proc. § 454(3) (McKinney 1968) provides in part:

"If the court is satisfied that the committed person may be discharged or released on condition without danger to himself or others, the court shall order his discharge, or his release on such conditions as the court determines to be necessary."

145. The distinction in release standards may be significant when applied to patients diagnosed as falling within that nebulous psychiatric classification of "sociopath."

146. N.Y. Code Crim. Proc. § 454(4) (McKinney 1968).

147. People v. Lally, 19 N.Y.2d 27, 34-5, 277 N.Y.S.2d 654, 660, 224 N.E.2d 87, 92 (1966).

IV. Confinement of Persons found Mentally Incapable of Standing Trial

The statutes governing the determination of a defendant's mental capability to stand trial, commonly called the issue of "present insanity,"[148] and commitment of those persons found incapable are contained in various provisions of the New York Code of Criminal Procedure.[149] Although important problems of when, if ever, during the course of a criminal trial, a defendant should be subjected to a present insanity test,[150] who should raise the issue,[151] how and by whom the issue should be determined,[152] and what should be the standard utilized to determine mental competency,[153] are beyond the scope of this paper, significant problems concerning institutionalization of persons after a determination of mental incapacity to stand trial are in need of discussion and resolution. The importance of this category of patient to the continued existence of Matteawan as a viable institution is demonstrated by the fact that

148. The issue of "present insanity" is thus distinguished from the defense of insanity in a criminal trial in which the issue is defendant's mental condition at the time of the criminal act as it affects his responsibility for that conduct.

149. N.Y. Code Crim. Proc. §§ 658-662-b, 870-875 (McKinney 1968).

150. An argument can be advanced that due to the disposition that is commonly made after a finding of incompetency to stand trial—i.e., indefinite confinement in a mental hospital —the determination of present insanity should not be made until after the criminal trial has been concluded. Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 468-9 (1967). The United States Supreme Court may have implicitly rejected such an argument in Pate v. Robinson, 383 U.S. 375 (1966). *See also* Youtsey v. United States, 97 F. 937, 940 (6th Cir. 1899) ("It is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or, after trial, receive judgment, or after judgment, undergo punishment.")

151. Pate v. Robinson, 383 U.S. 375 (1966) (Even if not requested, the court on its own motion should conduct a hearing where the evidence raises a bona fide doubt as to defendant's competency to stand trial.); Note, *Incompetency to Stand Trial, supra* note 150 at 466-8 (Only defendant's counsel should be permitted to raise issue when confinement in mental hospital can result from finding of incompetency); Slovenko, *Psychiatry, Criminal Law, and the Role of the Psychiatrist*, 1963 Duke L.J. 395, 412 (1963) (Only defense counsel should be permitted to raise the issue.)

152. Slovenko, *supra* note 151 at 410, stated that medical examiners have little knowledge of what it takes to understand a trial and to assist counsel, and they often confuse the test with and wrongfully apply the *M'Naghten* rule of criminal responsibility. *See also* Note, *Incompetency to Stand Trial, supra* note 150 at 469-71.

153. *See generally* Bar Report, *supra* note 137, at 79-85; Hess & Thomas, *Incompetency to Stand Trial: Procedures, Results, and Problems*, 119 Am. J. of Psychiatry 713, 718-20 (1963); Note, *Incompetency to Stand Trial, supra* note 150 at 457-61. In 1965, the Superintendent of Matteawan estimated that of the 907 patients then confined in Matteawan as mentally incapable of standing trial, at least 800 knew what they were charged with and that if the law was interpreted literally, these patients should stand trial. "Almost invariably schizophrenics know what they did." However, Dr. Johnston added that from a practical standpoint he has to combine both mental illness and ability to stand trial into a "package deal." The doctors at Matteawan would prefer to have patients recover from their psychoses before standing trial. Statements of W. C. Johnston, M.D., in conference with Grant H. Morris at Matteawan State Hospital, March 18, 1965. *Accord*, Vann, *Pretrial Determination and Judicial Decision Making: An Analysis of the Use of Psychiatric Information in the Administration of Criminal Justice*, 43 U. Det. L.J. 13, 29 (1965) (Paranoid schizophrenics can be logical, coherent, and knowledgeable about the crimes they are accused of and the proceedings taking place about them.) David Noah Fields, Esq., an attorney who has represented numerous Matteawan patients, stated that Matteawan doctors, in testifying against the return of a patient for trial, make the following legally incomprehensible argument, "The patient understands the charge intellectually but not emotionally." Statement of David Noah Fields to Grant H. Morris, August 8, 1968.

of the 605 patients confined in Matteawan on April 30, 1968, 448 (74%) were categorized as incapable of standing trial. By comparison, there were only six patients in Matteawan in the "not guilty by reason of insanity" category.[154]

In New York, persons found mentally incapable of standing trial are subcategorized by the applicable commitment statutes into one of three classifications:

Category I. Cases involving all defendants *indicted* for felonies or misdemeanors,[155] and cases in New York City involving misdemeanors for which informations have been filed;[156]

Category II. Cases involving all defendants charged with indictable felonies or misdemeanors for which indictments have not been returned, and cases in New York City involving misdemeanors for which informations have not been filed;[157]

Category III. Cases involving all defendants charged with offenses which are not crimes, and cases outside of New York City involving nonindictable misdemeanors.[158]

A Category I patient may be confined initially in Matteawan or a civil state hospital.[159] At any time during the period of his commitment, he may be transferred between institutional systems.[160] A Category II patient may also be confined initially in Matteawan or a civil state hospital.[161] If he is placed in Matteawan initially, the head of the institution, if he wishes to detain the patient longer than 30 days, must seek a court order pursuant to Mental Hygiene Law section 85 on an allegation that the patient is dangerously mentally ill.[162] If the Category II defendant is placed initially in a civil state hospital, the head of the institution, if he wishes to detain the patient longer than 30 days, must apply for an order of retention[163] in accordance with the civil commitment statute.[164] Incredibly, there is no specific provision pertaining to the patient who was detained initially in Matteawan, but who after the initial 30 day period, is not dangerously mentally ill, though still civilly

154. This small number of N.Y. Corr. Law § 454 (McKinney 1968) patients is not attributable to the New York Court of Appeals decision in People v. Lally, 19 N.Y.2d 27, 277 N.Y.S.2d 654, 224 N.E.2d 87 (1966). *See* discussion accompanying notes 106-12, *supra*. Dr. Johnston's statistics reveal that as of September 16, 1966, three months prior to the Lally decision, there were only eight § 454 cases in Matteawan. Letter and accompanying data from W. C. Johnston, M.D., to Grant H. Morris, November 22, 1966.

155. N.Y. Code Crim. Proc. § 662-b (McKinney 1968).

156. N.Y. Code Crim. Proc. § 875 (McKinney 1968). This statute specifically incorporates the procedures for commitment as set forth in N.Y. Code Crim. Proc. § 662-b (McKinney 1968).

157. N.Y. Code Crim. Proc. § 872 (McKinney 1968).

158. N.Y. Code Crim. Proc. § 873 (McKinney 1968).

159. N.Y. Code Crim. Proc. § 662-b(1) (McKinney 1968); N.Y. Code Crim. Proc. § 875 (McKinney 1968).

160. N.Y. Code Crim. Proc. § 662-b(2) (McKinney 1968); N.Y. Code Crim. Proc. § 875 (McKinney 1968).

161. N.Y. Code Crim. Proc. § 872(1) (McKinney 1968).

162. N.Y. Code Crim. Proc. § 872(1)(b) (McKinney 1968).

163. N.Y. Code Crim. Proc. § 872(1)(a) (McKinney 1968).

164. N.Y. Ment. Hy. Law § 73 (McKinney 1968).

commitable. Under the overall existing statutory schema, he belongs in a civil state hospital. Presumably he will be administratively transferred under a general provision of the statute that declares: "A person so committed may at any time during the period of his commitment be transferred to any appropriate state institution of the department of correction or of the department of mental hygiene . . . ."[165] A Category III patient may be confined initially only in a civil state hospital. [166] In all respects he is considered to be a civil patient, and if transfer to Matteawan is to be attempted, the provisions of Mental Hygiene Law section 85 must be complied with as is required for all other civil patients. *Quaere:* Is there an assumption underlying the distinctions made by the statutes that Category I patients are more dangerous as a class than Category II patients, and that Category II patients are more dangerous as a class than Category III patients? If so, can that assumption be logically premised on these seemingly irrelevant factors: (1) Category III patients are charged only with offenses and not felonies or misdemeanors; (2) Category II patients, while charged with the same crimes as Category I patients, are committed at an earlier stage of the criminal proceedings against them.[167] It is arguable that Category I patients are being denied equal protection of the law since they are not handled as "similarly situated" Category II patients, whose administrative placement in Matteawan is limited to 30 days. Apparently no appellate court has considered these arguments.

Of the 448 Matteawan patients confined as mentally incapable of standing trial, 437 are in Category I. Only eleven are in Category II. [168] The following discussion of the legality of confining mentally incapable defendants in Matteawan is therefore directed primarily at Category I.

If it is determined that a Category I defendant is in such a state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or the proceedings or of making his defense, the trial or proceedings must be suspended until he is no longer in such a state, and the court is required to "commit the defendant to the custody of the commissioner of mental hygiene to be placed in an *appropriate* institution in the state department of mental hygiene or the state department of correction. . . ."[169] "A defendant so committed may at any time during the period of his commitment be transferred to any *appropriate* state institution of the department of mental hygiene or of the department of correction. . . ."[170] The statute does not specify how the Commissioner of Mental Hygiene is to determine whether Matteawan is the appropriate in-

165. N.Y. Code Crim. Proc. § 872(1)(b) (McKinney 1968).
166. N.Y. Code Crim. Proc. § 873 (McKinney 1968).
167. The Bar Report, *supra* note 137, at 98 argues that the mechanical difference between Category I and Category II patients—*i.e.*, one is indicted sooner than the other—cannot rationally justify the existing distinction.
168. Letter and accompanying data from W. C. Johnston, M.D., to Grant H. Morris, May 21, 1968.
169. N.Y. Code Crim. Proc. § 662-b(1) (McKinney's 1968) (emphasis added).
170. N.Y. Code Crim. Proc. § 662-b(2) (McKinney's 1968) (emphasis added).

stitution for commitment or transfer of a particular defendant. It is necessary to examine the legislative development of the word "appropriate" as it relates to the confinement of mentally ill defendants in Matteawan.

Prior to 1949, the statute provided that upon a finding of present insanity in a case involving a Category I defendant, the court was required to commit the defendant "to a state hospital for the insane either of the department of correction or of the department of mental hygiene."[171]

In 1949, the statute was amended to indicate that mentally retarded defendants who were incapable of standing trial, were to be placed in Department of Mental Hygiene administered state schools, not civil state hospitals.[172] As amended, the statute provided for court commitment of the mentally incapable defendant "to a state hospital for the insane of the department of correction or any appropriate state institution of the department of mental hygiene."[173] Thus the word "appropriate" as initially enacted into the Code of Criminal Procedure was intended to distinguish between civil state hospitals and civil state schools; not between Matteawan and the civil institutions.

In 1953, the statute was again amended. No longer could mentally incapable Category I defendants be committed initially to an institution in the Department of Mental Hygiene. The amended statute required the court to "commit the defendant to an appropriate institution of the department of correction."[174]

The 1953 legislation also amended the statute governing commitment of Category II patients.[175] Upon a finding of present insanity, the court was empowered to commit the defendant "to any appropriate state institution of the department of correction or the department of mental hygiene . . . ."[176]

The Bar Association of the City of New York examined the difference in the handling of Category I and Category II patients created by the 1953

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171. N.Y. Sess. Laws 1939, ch. 861, § 2.

172. This legislative change may have been occasioned by court decisions such as People v. Randazzo, 179 Misc. 127, 129, 37 N.Y.S.2d 815, 817 (County Ct., Kings Co. 1942). In *Randazzo*, the court held that the existing statutory authority to commit a defendant for an examination as to sanity did not include the power to commit for examination as to mental defectiveness.

173. N.Y. Sess. Laws 1949, ch. 587, § 1.

174. N.Y. Sess. Laws 1953, ch. 785, § 3. Since Dannemora State Hospital is only authorized to confine mentally ill convicts, N.Y. Corr. Law § 383 (McKinney 1968), and, prior to *Baxstrom*, mentally ill sentence expired ex-convicts, N.Y. Sess. Laws 1948, ch. 377, § 1, Matteawan was the only "appropriate" institution in the Department of Correction for the confinement of Category I defendants mentally unable to stand trial. N.Y. Corr. Law § 400 (McKinney 1968).

The authority to administratively transfer Category I patients from Matteawan to civil state hospitals was not altered by the 1953 legislation.

175. N.Y. Sess. Laws 1953, ch. 785, § 5.

176. Prior to this amendment, the word "appropriate" as used in N.Y. Code Crim. Proc. § 872 referred only to the distinction between civil state hospitals and civil state schools. N.Y. Sess. Laws 1949, ch. 587, § 2. The court was authorized to "commit the defendant to a state hospital for the insane of the department of correction or any appropriate state institution of the department of mental hygiene."

legislation. In its first report, published in 1962, the Association found this distinction to be unwarranted.

> The accidents of geography and of the stage in the proceeding at which a psychiatric examination is sought are likely to determine where the defendant will be hospitalized, regardless of the absence of any showing that they are based on the medical needs of the patient or the needs of society. Statutory provisions which allow accidental circumstances to determine such results might well be subject to attack on constitutional grounds as denying equal protection of the laws.[177]

The Association's recommendation that automatic commitment of Category I patients to Matteawan be eliminated resulted in the 1965 legislation, which is the existing law.[178] According to the Bar Association, the effect of this legislation was to reject "[w]hat might be called the conclusive presumption of *dangerousness* based on the mere fact of an early indictment for any crime . . . ."[179]

While the existing commitment-of-mentally-incapable-defendants statute does not by its language require a determination of dangerous mental illness before Matteawan can be denominated as the "appropriate" institution for a defendant's confinement, the Bar Association is not alone in its opinion that this is exactly what the statute requires. Related legislation, also enacted in 1965, so indicates.[180] New York Code of Criminal Procedure section 662-b (3b) provides:

> In the event of the dismissal of the indictments or proceedings as herein provided and if the defendant shall be confined to an institution in the department of correction and *shall continue to be so dangerously mentally ill* or dangerously mentally defective as to require continued treatment and confinement in an institution in the department of correction, the head of such institution may retain the defendant. . . .[181]

Obviously the italicized phrase indicates that confinement of a mentally incapable defendant is appropriate only if he is dangerously mentally ill prior to the dismissal of the indictment—*i.e.*, at the time of initial commitment.

At least one judicial opinion has also recognized that to properly confine a mentally incapable defendant in Matteawan requires a finding of dangerous mental illness. In *People v. Hyatt*,[182] the court, in construing the 1949 statute which authorized the court[183] to commit the defendant to a civil hospital or Matteawan, ordered him to the civil hospital. The court stated:

177. Association of the Bar of the City of New York and Cornell Law School, Mental Illness and Due Process 234-35 (1962).

178. Bar Report, *supra* note 137, at 92. *See* discussion in text accompanying notes 159-66, *supra*.

179. Bar Report, *supra* note 137, at 98 (emphasis added).

180. N.Y. Sess. Laws 1965, ch. 540, § 1.

181. N.Y. Code Crim. Proc. § 662-b (3b) (McKinney 1968) (emphasis added).

182. 187 Misc. 1031, 68 N.Y.S.2d 903 (Sup. Ct., Erie Co. 1946).

183. *See* discussion in text accompanying note 173, *supra*. The existing statute authorizes the Commissioner of Mental Hygiene to make this determination. N.Y. Code Crim. Proc. § 662-b(1) (McKinney 1968).

> Nothing in the papers or in the argument before us has suggested that this defendant has any dangerous or violent tendencies whatsoever. No great harm can result from the construction which we have placed upon the statute and the exercise of discretion which we have so stated, for there still exists a simple procedure by which transfer of this defendant can, if necessary, be made from the Buffalo State Hospital to the Matteawan State Hospital. (Mental Hygiene Law, § 85 *et seq.*)[184]

However, use of the section 85 procedures, including the right of the patient to demand a hearing on the question of alleged dangerous mental illness, has not materialized.[185]

In recommending the elimination of automatic commitment of Category I defendants to Matteawan, the Bar Association in 1962 also recommended that the decision on whether a defendant should be committed initially to a civil hospital or to Matteawan, should be made by the *court*.[186] Surprisingly, this recommendation was rejected—the Commissioner of Mental Hygiene makes that determination pursuant to the existing legislation.

If, as contended above, the Commissioner of Mental Hygiene is statutorily empowered to designate Matteawan as the "appropriate" institution for confinement of a mentally incapable defendant only upon a determination of dangerous mental illness, is he making that determination in each case? There is some evidence to indicate that he is not. The Bar Association of the City of New York, in a recent report, found that the 1965 statutory change

> entrusting the choice of hospital to administrative decision based upon clinical judgment caused a perceptible increase in the volume of patients going to Matteawan.[187]
>
> . . . .
>
> The available statistics appear to indicate that when the decision is left to clinical judgment, placement at Matteawan occurs in a far greater number of cases than when a court decides, and that very few defendants sent by courts to civil hospitals under the former procedures had to be transferred to Matteawan at a later date.[188]

Assuming, *arguendo*, that the Commissioner of Mental Hygiene is determining the issue of dangerous mental illness as the statute apparently requires, is

184. People v. Hyatt, 187 Misc. 1031, 1033, 68 N.Y.S.2d 903, 906 (Sup. Ct., Erie Co. 1946).

185. *See* United States *ex rel.* Morgan v. Wolfe, 232 F. Supp. 85 (S.D.N.Y. 1964) in which the court dismissed a writ of habeas corpus brought by an incapable-of-standing-trial patient who was administratively transferred from a civil hospital to Matteawan. The court found no deprivation of due process nor equal protection in the failure of the Commissioner of Mental Hygiene to accord defendant with notice and hearing of the transfer.

This case has been strongly criticized for misconstruing the New York Court of Appeals decision in People *ex rel.* Brown v. Johnston, 9 N.Y.2d 482, 215 N.Y.S.2d 44, 174 N.E.2d 725 (1961). Bar Report, *supra* note 137, at 94-6.

186. Association of the Bar of the City of New York and Cornell Law School, *supra* note 177, at 254.

187. Bar Report, *supra* note 137, at 98.

188. *Id.* at 100-1.

the statute itself violative of the constitutional requirements of due process and equal protection of the laws? Unfortunately, neither the United States Supreme Court nor the New York Court of Appeals has decided a case involving mentally incapable defendants that has had the impact that *Baxstrom* or *Lally* had on other patient classifications. It is necessary to analogize the mentally incapable defendant classification to the other patient classifications.

Are mentally incapable defendants similarly situated with mentally ill sentence-serving convicts? While it may seem absurd to suggest such an identity, one recent study concluded that there exists an unofficial and extra-legal judicial recognition of Matteawan as an institution serving the social function of a prison for unconvicted defendants.[189] Persons who had been committed to Matteawan as unable to stand trial and then released, tried and sentenced, were given lenient treatment. "This is especially true in those cases where either the number of prior convictions or the severity of the crime would have strongly militated toward harsh sentences."[190] The term of hospitalization tended to mitigate their sentences.[191] Additionally, defendants who had been given psychiatric examinations, found capable of standing trial, and thus not sent to Matteawan, received harsher sentences than those not examined.[192]

The New York Penal Law has recognized the penal character of confinement of unconvicted defendants in Matteawan. Time spent by a mentally incapable defendant confined in Matteawan is calculated as a part of his sentence if he is subsequently convicted of the charge against him.[193] Prior to September 1, 1967, there was no similar calculation made for a defendant confined in a civil state hospital.[194]

Even if it is assumed that mentally ill persons accused of crimes are similarly situated with mentally ill persons convicted of crimes, maximum security institutionalization in Matteawan does not necessarily follow. Proper treatment of mental illness and the imposition of security measures does not depend on a "criminal" label but on considerations of the diagnosis and pathology of the particular patient's illness. The logic of that position applies equally to both convicted "criminals" and accused "criminals." [195]

Since New York credits the time spent by pre-conviction defendants in Matteawan toward any sentences subsequently imposed,[196] it is arguable that

189. Vann, *supra* note 153, at 31.
190. *Id.* at 24.
191. *Id.* at 27.
192. *Id.* at 21. In the ten year interval of the study, not one defendant who was evaluated by psychiatrists ever pleaded not guilty to the charge against him. "Once psychiatric data is introduced, the issue really changes from one of guilt or innocence to that of the nature of the disposition to be made." *Id.* at 32.
193. N.Y. Sess. Laws 1964, ch. 361, § 1.
194. N.Y. Penal Law § 70.30 subd. 3 (McKinney 1968), effective September 1, 1967, credits the amount of time spent by a defendant in "custody" prior to conviction, thus eliminating this distinction between Matteawan and the civil hospitals.
195. *See* discussion in text accompanying notes 260-68 *infra*. *See also Confusion of Confinement*, *supra* note 17, at 661-3.
196. *See* discussion in text accompanying notes 193-4, *supra*.

those unconvicted defendants who have been confined in Matteawan for periods exceeding the maximum sentences to which they could be subjected after trial and conviction, are similarly situated with mentally ill ex-convicts.[197] Thus, utilizing the rationale of the Supreme Court in *Baxstrom*,[198] if a person convicted of a crime cannot be detained in a Department of Correction mental institution by the administrative decision of the Commissioner of Mental Hygiene after his sentence has expired, surely an unconvicted defendant cannot be so detained beyond the maximum possible sentence that could be imposed against him when there is doubt as to whether he would even be convicted. The Court in *Baxstrom* held that sentence-expired ex-convicts cannot be administratively classified as dangerously mentally ill in spite of their *proven* past criminal activity; *a fortiori* as to "sentence-expired" accused defendants whose past criminal activity is only *alleged.*

In 1878, the first New York State Commissioner in Lunacy, in discussing confinement of mentally incapable defendants, wrote, "A court has no authority to impress a criminal character upon an un-convicted person by decreeing his association with convicts."[199] It is an elementary but fundamental principle of our legal system that a person accused of a crime is presumed innocent until he is proven guilty.[200] Although he may be required to post bail and is obligated to appear at his trial, a defendant in a criminal case does not forfeit his right to vote, to engage in a profession, etc., by his status as an accused. Since an ex-convict may have lost these rights due to his previous criminal conviction, the situation of the mentally incapable defendant is more analogous to the civil patient than is the ex-convict patient.[201] Nevertheless, the accused defendant is currently denied a judicial determination of dangerous mental illness—*i.e.*, the protection against illegal confinement in Matteawan that is presently afforded to both civil patients and ex-convict patients. If, for purposes of mental institutionalization, accused criminal defendants are similarly situated with civil patients, then the argument made previously that it is unconstitutional to confine civil patients in an institution administered by a department of correction, is equally as applicable to persons accused of crimes.[202]

Finally, are mentally incapable defendants similarly situated with persons acquitted of crimes by reason of insanity? It may be argued that an "acquitted" mental patient is more analogous to a "civil" patient than is an "accused" patient, in that he has already been found not guilty of the crime charged

197. This argument has been made at the trial level in Brief for Petitioner at 3-5, People *ex rel.* Hargrove v. Johnston (Sup. Ct., Dutchess Co. 1967).

198. Baxstrom v. Herold, 383 U.S. 107 (1966). *See, Confusion of Confinement, supra* note 17, at 665-6.

199. Ordronaux, The Lunacy Laws of New York, and the Judicial Aspects of Insanity 93 (1878).

200. *See, e.g.*, Whitree v. State, 56 Misc.2d 693, 290 N.Y.S.2d 486, 498 (Ct. of Claims 1968).

201. Bar Report, *supra* note 137, at 101.

202. *See* discussion in text accompanying notes 38-59, *supra.*

against him. But such an analysis disregards the fact that a verdict of not guilty by reason of insanity includes a finding that the acquitted defendant did commit the criminal act charged against him.[203] Though there may be some justification for presuming continued "dangerousness" upon an acquittal by reason of insanity,[204] the New York Court of Appeals in *Lally*[205] prohibited the administrative determination of such condition. In essence, the court reasoned that if a *convicted* defendant cannot be detained in Matteawan on the order of the Commissioner of Mental Hygiene upon the expiration of his sentence, then the "spirit of *Baxstrom*"[206] also forbids such expeditious commitment of an *acquitted non-convict* defendant. Although many aspects of the *Lally* decision have been criticized previously in this paper,[207] this reasoning is convincing. If proven criminal activity or criminal propensity does not justify a short-circuiting of a judicial determination of dangerous mental illness for other non-convicts,[208] obviously there is even less justification for an administrative determination of "dangerousness" of an *accused non-convict* defendant whose criminal activity or propensity is still to be proven.

While it may be presumptuous to predict what a court will decide, it is the opinion of this writer that if the New York Court of Appeals is squarely faced with the issue, it will find the present procedures for commitment of mentally incapable defendants to Matteawan to be deficient in not according accused defendants the procedural safeguards established under the civil commitment scheme.[209] Whether the court will declare the statutes unconstitutional as violative of the equal protection principle of *Baxstrom*, or will judicially "amend" the statutes and uphold their validity as it did in *Lally*, is a matter of pure speculation. However, it may be more difficult for the court to use the *Lally* approach for the following reasons:

(1) The court in *Lally*, was able to distinguish between civil patients and acquitted defendants and thus to justify mandatory commitment for mental examination for possible civil commitment, by reasoning that the acquitted defendant had *chosen* to plead not guilty by reason of insanity.[210] Since the question of present insanity may be raised even over an accused defendant's objection,[211]

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203. *See, e.g.*, Ragsdale v. Overholser, 281 F.2d 943, 948 (D.C. Cir. 1960); Rucker v. United States, 280 F.2d 623, 625 (D.C. Cir. 1960); Note, *Federal Commitment of Defendants Found Not Guilty by Reason of Insanity—Proposed Legislation*, *supra* note 93, at 938.

204. *But see* text accompanying notes 88-104, 129-34, *supra*, for arguments disputing the underlying rationale of such a presumption.

205. People v. Lally, 19 N.Y.2d 27, 277 N.Y.S.2d 654, 224 N.E.2d 87 (1966).

206. *Id.* at 34, 277 N.Y.S.2d at 660, 224 N.E.2d at 91. *See* discussion in text accompanying notes 110-2, *supra*.

207. *See* discussion in text accompanying notes 133-47, *supra*.

208. Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968). *See* discussion in text accompanying notes 94-100, *supra*.

209. N.Y. Ment. Hy. Law §§ 74, 85 (McKinney 1968).

210. *See* discussion in text accompanying notes 106-8, *supra*.

211 Pate v. Robinson, 383 U.S. 375 (1966) (Even if not requested, the court on its own motion should conduct a hearing where the evidence raises a bona fide doubt as to de-

there may be no legitimate basis for detaining a mentally incapable defendant for an examination as to his civil commitability.

(2) Prior to 1965, the responsibility for determining the "appropriate" place of confinement of mentally incapable defendants rested statutorily on the courts.[212] The 1965 legislation invested that responsibility on the Commissioner of Mental Hygiene.[213] In the face of this recent legislative history[214]—a history not paralleled in the case of acquitted defendants—would the New York Court of Appeals limit the Commissioner's power to dispose of the patient only after a court determination as to the appropriate place of confinement and in accordance with the court's decision?

(3) To uphold the incapable defendant commitment statutes while requiring a judicial determination of dangerous mental illness prior to confinement in Matteawan, would nullify other provisions of those statutes. For example, upon the dismissal of an indictment of a mentally incapable defendant confined in Matteawan, if the Superintendent of Matteawan desires to retain the patient, the existing statute requires him to apply, within thirty days, to the court for certification of the patient as dangerously mentally ill as provided in section 85 of the Mental Hygiene Law.[215] Would this provision have any meaning if the patient had already been afforded a section 85 hearing prior to his confinement in Matteawan? The dismissal of the indictment would seemingly be irrelevant to his mental condition.

The mentally incapable defendant commitment statutes as presently administered or as they could be construed in a *Lally*-type court decision are arguably constitutionally defective for yet another reason.[216] Other civil mental patients can be transferred to Matteawan pursuant to Mental Hygiene Law section 85 only upon a showing of dangerous mental illness exhibited at the civil hospital. The non-convict accused defendant may be deprived of the opportunity to receive treatment in a civil hospital and to demonstrate that he is not a danger to that institution. This is an unconstitutional denial of equal protection of the laws. The statutes in the proposed New York Criminal Procedure Law, as prepared by the Temporary Commission on Revision of the Penal Law and Criminal Code, also contain this apparent imperfection.[217]

Automatic commitment of a defendant found mentally incapable of standing trial to either a civil hospital or Matteawan may also violate the principle of

fendant's competency to stand trial.) *Accord*, N.Y. Code Crim. Proc. §§ 658, 870 (McKinney 1968).

212. N.Y. Sess. Laws 1953, ch. 785, §§ 3, 5.

213. N.Y. Sess. Laws 1965, ch. 540, §§ 1, 2.

214. *See* discussion in text accompanying notes 174-9, *supra*.

215. N.Y. Code Crim. Proc. § 662-b (3b) (McKinney 1968).

216. A similar contention has been made regarding persons acquitted of crimes by reason of insanity, *see* discussion in text accompanying notes 127-8, *supra*, and mentally ill ex-convicts, *see Confusion of Confinement*, *supra* note 17 at 675-8.

217. State of N.Y. Temporary Commission on Revision of the Penal Law and Criminal Code, Proposed New York Criminal Procedure Law, §§ 405.10 (2), 405.50 (1), 405.60 (1) (1967).

Specht v. Patterson.[218] A finding that a criminal defendant is mentally incapable of understanding the charge against him, or the proceedings, or of making his defense (the test of present insanity)[219] does not necessarily mean that he is in need of care and treatment (the test of civil commitment)[220] or that he is dangerously mentally ill (the test of Matteawan commitment of civil patients).[221] A new finding of fact is required before a mentally incapable defendant can be committed, and as previously mentioned, there may be no legitimate basis for detaining a mentally incapable defendant for an examination as to his civil commitability.[222]

V. Defining and Securing The Solution

Even if the above arguments as to the *illegality* of confining "non-criminal criminals" in a Department of Correction institution are unconvincing, the more important issue is the *undesirability* of permitting such discrimination. Once society recognizes that "non-criminal criminals" are entitled to treatment equivalent to that afforded patients confined in the civil hospitals, the following principles advocated by this paper become elementary and should elicit little controversy.

1. If a statute authorizes the involuntary confinement of a mentally ill person in a mental hospital, the underlying purpose of that confinement is treatment of that person's illness.

2. Every mentally ill person so confined is entitled to treatment of his mental illness.[223]

3. Security measures should not be imposed on a mentally ill person unless there is need for such measures, as determined by the diagnosis and pathology of the individual's mental condition.[224]

4. Even when security measures are necessary, the emphasis of the mental hospital should be on treatment of the patient's mental condition, not on maintaining security.[225]

To achieve these goals, a basic question must be resolved: is the Department of Correction the proper agency of government to administer a mental hospital? It is submitted that the vital defect in assigning to the Department of Correction administrative responsibility over any mentally ill person, lies not in inadequate

218. 386 U.S. 605 (1967). *See* discussion in text accompanying notes 101-5, *supra.*
219. N.Y. Code Crim. Proc. §§ 662-b(1), 872 (1), 875 (McKinney 1968).
220. N.Y. Ment. Hy. Law § 72 (1) (3) (McKinney 1968).
221. N.Y. Ment. Hy. Law § 85 (3)(4) (McKinney 1968).
222. *See* discussion in text accompanying notes 210-11 *supra.*
223. *See* Diamond, *Criminal Responsibility of the Mentally Ill,* 14 Stan. L. Rev. 59, 86 (1961) ("to each according to need and to none according to legal classification"); Arnold, the Symbols of Government 11 ("sickness rationally demands curative treatment").
224. *See* Weihofen, *Institutional Treatment of Persons Acquitted by Reason of Insanity,* 38 Texas L. Rev. 849, 856 (1960) ("What security measures are needed depends on the diagnosis of the individual patient's mental condition—not on the type of crime that he has committed or with which he is charged.").
225. *See* Sattern, *The Concept of Responsibility in Psychiatry and its Relationship to the Legal Problem of "Criminal Responsibility,"* 4 Kan. L. Rev. 361 (1956) ("the emphasis would have to be on treatment rather than security for its own sake").

facilities and inadequate staffing,[226] but in the penal philosophy itself. The difference between the average length of stay of Matteawan patients (a minimum of six to seven years) and civil state hospital patients (four months)[227] can only be attributed to a "confinement" orientation prevalent in penology today. So long as the primary function of the Department of Correction is to administer the prison system—an institutional system predicated on confinement of inmates for the purpose of security—substantial improvement in the situation at Matteawan cannot reasonably be anticipated.

If the existing New York system of divided authority over various classes of mental patients cannot be improved sufficiently to warrant its continuance, is it responsive to the problem to transfer jurisdiction of Matteawan to the Department of Mental Hygiene and to continue it in operation as a maximum security institution? It is submitted that the only constructive effect of such a "solution" would be a repainting of signs outside the facility and a substitution of stationery letterhead.[228] While it is impossible to forecast exactly how the New York Department of Mental Hygiene would administer Matteawan if it was given jurisdiction over it, to illustrate the deficiencies of this potential solution it may be desirable to examine how a sister-state Department of Mental Hygiene has administered its counterpart institution.

Atascadero State Hospital is one of fourteen hospitals operated by the California Department of Mental Hygiene,[229] though it is unique among those institutions as a maximum security hospital.[230] While Matteawan was constructed prior to the Twentieth Century,[231] Atascadero was built in the 1950's, and opened in June 1954.[232] Broadly speaking, the hospital serves two functions: (1) to treat patients currently involved with the criminal law; (2) to treat patients who

226. Dr. Johnston recently prepared data comparing staffing of Matteawan with Hudson River State Hospital, a civil hospital under the jurisdiction of the Department of Mental Hygiene. Hudson River housed 4,091 in-patients on June 30, 1968. N.Y. State Dept. of Mental Hygiene, Monthly Statistical Report for June 1966 at 4. The Hudson River figures are for the fiscal year ending 3-31-67. The Matteawan figures are for the period ending 11-18-68.

Position	Number at Hudson River	Number at Matteawan
Physicians	63	14
Ward Service Nurses	181	17
Social Service	38	10
Occupational Therapists	44	12

Letter and accompanying data from W. C. Johnston, M.D., to Grant H. Morris, December 30, 1968. *See also* Bar Report, *supra* note 137, at 62-3.

227. *See* discussion in text accompanying notes 9-10, *supra*.

228. Even the Superintendent of Matteawan recently admitted, "It is my contention that if Budget and the Legislature so decided it would make no difference whether Matteawan was under the Department of Correction or the Department of Mental Hygiene." Letter from W. C. Johnston, M.D., to Grant H. Morris, December 30, 1968.

229. Cal. Welf. & Inst. Code § 4100 (West 1968).

230. Atascadero State Hospital, The Mentally Ill Offender 2.

231. Money was appropriated in 1888 to construct Matteawan. N.Y. Sess. Laws 1888, ch. 45.

232. Atascadero State Hospital, *supra* note 230.

present difficult management problems at other Department of Mental Hygiene facilities.[233] Although large number of Atascadero patients are classified as mentally disordered sex offenders,[234] a substantial number of those confined are in categories analogous to those of patients in Matteawan. Of the 1611 patients in Atascadero on June 13, 1966, 329 were categorized as civil patients[235] who had been security problems at other mental hygiene facilities and who had been administratively transferred to Atascadero, 359 were categorized as mentally incapable of standing trial,[236] and 182 were categorized as not guilty of crimes by reason of insanity.[237]

In 1966, Professor Herbert L. Packer of the Stanford University School of Law, conducted a study of Atascadero for the California Department of Mental Hygiene. Although his report has not been published, upon the request of the author of this article,[238] Professor Packer received permission from the Department to make the report available.[239]

As to the dangerous civil patients, the Packer Report concluded, "This group of patients constitutes the bulk of those who can be transferred to other institutions."[240] The report suggested the need for tighter administrative control over transfers-in from other Department of Mental Hygiene facilities.[241]

As to persons found mentally incapable of standing trial, the Packer Report disclosed,

> If the files in the sample studied are any indication, it is apparent that the vast majority of patients in the 1370 category [mentally incapable defendants] are not dangerous to the physical safety of themselves or of others. In this important sense, they closely resemble civilly committed mentally ill persons and the only independent reason for maintaining them at the Hospital rather than some other DMH facility is the fact that criminal charges are pending against them. . . . The

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233. Memorandum from Herbert L. Packer to Norman C. Lindquist, August 16, 1966, at 2 [hereinafter cited as Packer Report].

234. Cal. Welf. & Inst. Code §§ 6300 et seq. (West 1968) (operative July 1, 1969). Prior to the effective date of these statutes, the patients were confined pursuant to Cal. Welf. & Inst. Code in the following categories: (1) mentally disordered sex offenders—observational; (2) mentally disordered sex offenders—indeterminate; (3) mentally disordered sex offenders—readmitted indeterminate; (4) mentally abnormal sex offenders. Packer Report, *supra* note 233, lists the following numbers of patients in each category in Atascadero on June 13, 1966—(1) 187; (2) 479; (3) 33; (4) 42.

235. Packer Report *supra* note 233, at 1 lists 299 mentally ill "dangerous" patients and 30 mentally retarded "dangerous" patients. These patients were confined pursuant to Cal. Welf. & Inst. Code §§ 5567, 5599 (West 1968).

236. Cal. Penal Code § 1370 (West 1968).

237. Cal. Penal Code § 1026 (West 1968).

238. A prior request for the report, made by the author directly to the California Department of Mental Hygiene, was refused. Letter from Wm. C. Keating, M.D., Assistant Deputy Director, Division of State Services, to Grant H. Morris, August 6, 1968.

239. Letter and documents from Herbert L. Packer to Grant H. Morris, September 23, 1968. Professor Packer enclosed a copy of the letter of permission from Harold M. Janney, M.D., Chief, Office of Program Review, dated September 11, 1968.

240. Packer Report, *supra* note 233, at 2.

241. *Id.*

result is that the hospital population contains a number of people for whom there is no functional necessity of maximum security custodial care.[242]

As to persons found not guilty of crimes by reason of insanity, the Packer research uncovered these deficiencies:

> The Department has explicit statutory authorization to transfer patients in this category from one facility to another. It is questionable whether the flexibility afforded by the law is being adequately taken advantage of. There do not appear to be any criteria developed to determine fitness for transfer. An administrative review mechanism should be developed to insure continuous screening of this group to permit transfer at the earliest possible moment.
>
> . . . .
>
> A related problem is the tendency to take the seriousness of the criminal offense into account in determining the length of the patient's stay. Members of the staff readily admit this tendency in informal conversation. An extreme example is the unwritten "10-year rule," whereby patients who were charged with murder are not considered for release for that length of time. Granting the existence of public relations problems for the Hospital, the fact remains that it is a hospital, not a prison, and that patients are there for treatment rather than punishment. It is well known that murderers as a group have a low rate of recidivism and also that many assaultive psychotics who happen not to have killed as yet are more dangerous than some murderers. It should be Hospital policy to judge each PC 1026 [not guilty by reason of insanity] case on its facts without giving more weight to the nature of the offense charged than is relevant to a decision as to likelihood of recovery from mental illness.[243]

S. W. Morgan, M.D., the Superintendant and Medical Director of Atascadero, responded to the criticism of the Packer Report,[244] and, according to Professor Packer, the "comments explicitly reject almost all of the recommendations for change made in the [Packer Report]."[245] Of equal significance is the obvious and overwhelming security orientation of the superintendent and staff of Atascadero. For example, as to the unwritten "10-year rule," the superintendent revealed that not only are patients acquitted of murder not considered for *release* for 10 years, but they are not even considered for *transfer* out of Atascadero for 10 years.[246] He also added: "On severe assaultive cases, we will usually consider for release when the patient has been three years without evidence of

242. *Id.* at 3-4.

243. *Id.* at 8-9.

244. Memorandum from S. W. Morgan, M.D., Superintendent and Medical Director, to E. F. Galioni, M.D., Deputy Director, Division of State Services, October 6, 1966.

245. Memorandum from Herbert L. Packer to Norman E. Lindquist, November 28, 1966 at 1.

246. Memorandum from S. W. Morgan, M.D., to E. F. Galioni, M.D., October 6, 1966 at 4.

mental illness and has an acceptable social attitude that would indicate he could get along on the outside without assaultive difficulties."[247]

As to Professor Packer's suggestion that Atascadero should not give more weight to the nature of the offense charged than is relevant to a decision as to likelihood of recovery from mental illness, Dr. Morgan stated: "The present superintendent could not assume the responsibility and would need some kind of backup authority from the Director of DMH to approve the release of 1026 P.C. [not guilty by reason of insanity] cases when dangerousness of the offense was not given top priority."[248]

Professor Packer expressed concern about sex offender patients who have been treated to the point where they are ready for return to the community and who are subjected, by present court procedures, to a period of punitive incarceration in a county jail.[249] The hospital's comment: "We agree that a patient being retained in jail is uncomfortable and we would like to avoid it if possible; however, it is an excellent test as to the true success of our therapy program."[250]

Two years after the Packer report was submitted to the California Department of Mental Hygiene, the Department has failed to remedy the deficiencies uncovered in the report.[251]

It has been suggested that the existence of the penal philosophy, with its insistence on confinement for the purpose of security, prevents the proper administration of Matteawan and Dannemora as mental hospitals by the New York Department of Correction. The transfer of jurisdiction of those institutions would introduce the penal philosophy into the New York Department of Mental Hygiene. The Atascadero material signals the destructive effect of security orientation on the proper treatment of mentally ill patients. The potential for a repetition of the California experience in New York should not be minimized.

Any similar proposal to build a *new* maximum security institution within the Department of Mental Hygiene to confine "dangerous" patients therein, should also be rejected. The fresh mortar and bricks of Atascadero did not prevent it from acquiring a security-at-the-expense-of-treatment orientation.

The Bar Association of the City of New York has questioned the central

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247. *Id. Quaere*: If the person is not mentally ill after three years, but does not have an acceptable social attitude, would Atascadero release him?

248. *Id.* at 5

249. Packer Report, *supra* note 233, at 15-6.

250. Memorandum from S. W. Morgan, M.D., to E. F. Galioni, M.D., October 6, 1966, at 4. As to Professor Packer's suggestion that the Department obtain a list of psychiatrists in private practice who are called upon to conduct certain psychiatric examinations, Dr. Morgan stated that such a list "would probably not benefit our hospital too much because the outside experts would, for the most part, be unwilling to take directions from the hospital. (The judges usually weed out the private psychiatrist they do not like and have their own selected few who make examinations according to the judges' wishes.)" *Id.* at 15.

251. Letter from Harold M. Janney, M.D., Chief, Office of the Program Review, to Herbert Packer, September 11, 1968. The letter contained these statements: "Mrs. Barbara Calais, DMH Legal Officer, hopes to have some legislation for the next legislature to consider. As you indicated in your report, this is a most complex subject and I expect there will be more than the usual difficulties before changes are effected."

institution approach as a solution to the present situation. Whether the security institution is department-transferred Matteawan, or a newly constructed Mental Hygiene security institution accepting only "dangerous" patients,

> [e]ach of these possibilities presupposes a central institution accepting patients on a statewide basis. Each would impede visiting and social work, and would be inconsistent with the localized approach to hospitalization within the Department of Mental Hygiene. High-security custody in a central institution, moreover, would involve severe restrictions upon the patient's freedom, and no matter what its name, location, or parent department, it can also be expected to carry with it in the public eye a stigma of dangerousness not easily overcome.[252]

After the Supreme Court decision in *Baxstrom v. Herold*,[253] nearly 1000 ex-convict mental patients were transferred into civil state hospitals from Department of Correction confinement.[254] There is no indication that these patients disrupted the civil hospital society. In the Department's own words: "After one year there have been no significant problems with the patients. All have been absorbed into the general patient population, many reside on open wards, over 200 have been released, and only seven have been certified as too dangerous for a civil hospital."[255]

It is submitted that the integration of ex-convict patients into the wards of civil hospitals and their subsequent treatment as civil patients, is directly responsible for the treatment successes. This same "integration and treatment" approach should be extended to all classes of mental patients presently confined in Department of Correction mental institutions.

The Bar Association of the City of New York recently recommended that dangerously mentally ill patients be hospitalized in regional facilities established as high-security wards in existing civil state hospitals.[256] The Association stated:

> This solution would avoid the geographic drawbacks of a central institution, as well as the probable stigma associated with it. It is possible, moreover, that gradual reintegration of the patient into the rest of the hospital population might be more easily accomplished for patients recovering from long-term dangerous mental illness than would be possible by retransfer to an "open door" hospital from a central institution with maximum security throughout. We recognize that the need for sustained security, even though only partial, would be generally out of character for "open door" institutions. However, if the department is properly to be charged with full responsibility for the hospitalization of *all* civil patients, an accommodation suiting the medical and custodial needs of all its patients must be reached.[257]

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252. Bar Report, *supra* note 137, at 66.
253. 383 U.S. 107 (1966).
254. *See* discussion in text accompanying notes 11-21, *supra*.
255. Hunt and Wiley, *Operation Baxstrom After One Year*, 124 Am. J. Psychiatry 974 (1968), as it appears in Bar Report, *supra* note 137, at 228.
256. Bar Report, *supra* note 137, at 67.
257. *Id.* at 68 (emphasis in original).

Even the present Commissioner of Mental Hygiene has suggested that "by adding enough personnel, we [the Department of Mental Hygiene] could take care of the most dangerous person."[258]

While the Bar Association's advice that the Department of Mental Hygiene have jurisdiction over even the most dangerous civil patient is meritorious, there is a basic inconsistency in the limitations of its proposal. This flaw is manifested in two consecutive sentences contained in its report:

> The basic and unifying thread which runs throughout our recommendation is a rejection of the notion that the mere fact of a criminal charge or conviction is a proper basis upon which to build other unnecessary, unprofitable, and essentially unfair distinctions among the mentally ill.
>
> Mentally ill prisoners serving sentences should continue to be hospitalized in institutions under the jurisdiction of the Department of Correction.[259]

By recommending that mentally ill sentence-serving convicts continue to be retained in Department of Correction institutions, the Bar Association has itself expressed a willingness to build unnecessary, unprofitable, and essentially unfair distinctions among the mentally ill.

It has never been suggested that sentence-serving convicts suffer from different mental illnesses than persons who are civilly committed. Absent that difference, mentally ill convicts who are transferred out of the prison environment for treatment of their mental conditions are similarly situated with all other persons who have been removed from society and confined for treatment of their mental conditions. Mentally ill convicts are thus entitled to treatment equal to that received by civilly committed patients.[260] Whether one compares the statistics on average length of confinement,[261] the problems of difficulty of visitation,[262] or the factor of relative stigma attaching from confinement,[263] the inescapable conclusion is that "segregated" treatment of any class of mental patient in a

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258. Statement of Alan D. Miller, M.D., Commissioner of Mental Hygiene, State of New York, to Grant H. Morris, July 26, 1966. Contrarily, the Superintendent of Matteawan stated, "I am taking the stand that New York needs at least two criminal mental hospitals and that to establish multiple little 'Matteawans' at the civil hospitals would be impractical and without security." Letter from W. C. Johnston, M.D., to Grant H. Morris, May 21, 1968.

259. Bar Report, *supra* note 137, at 1-2.

260. *See Confusion of Confinement*, *supra* note 17, at 661-2.

261. *See* discussion in text accompanying notes 9-10, *supra*.

262. Most male mentally ill sentence-serving convicts are confined in Dannemora State Hospital, which is operated by the Department of Correction. N.Y. Corr. Law § 383 (McKinney 1968). Located in the sparsely populated northeast corner of the state, it is not easily accessible from major metropolitan areas. Additionally, N.Y. Corr. Law § 388 (McKinney 1968) discourages the therapeutic necessities of visitation and communication. *See Confusion of Confinement*, *supra* note 17 at 688-9.

263. *See* discussion in text accompanying note 257, *supra*. When necessary, courts, in comparing institutions have even examined those qualities which are incapable of objective measurement. *See* Sweat v. Painter, 339 U.S. 629 (1950) (comparison of law schools).

Department of Correction institution is inherently unequal,[264] inherently discriminatory, and inherently unjust.

The great imperfection in the New York system as it presently exists or as proposed by the Bar Association is not simply that it separates the administration of mental hospitals into Department of Mental Hygiene run institutions and Department of Correction run institutions. Rather, the system is irrational in classifying mental patients utilizing the factor of "criminality"—a label that is irrelevant to the diagnosis and pathology of the individual's mental condition—and imposing maximum security confinement on all patients in the class. By comparing the mentally ill convict "class" with other "non-criminal criminal" classes, the defect can be exposed.

The most dangerous of all patients in a mental hospital are those who are presently transferred into Matteawan pursuant to section 85 of the Mental Hygiene Law. If as the Bar Association report recommends, these patients should be handled in the Department of Mental Hygiene institutions,[265] then doesn't that department also have the capacity, facilities, and security arrangements necessary to handle mentally ill, sentence-serving convicts who may be less dangerous, and surely no more dangerous, than the section 85 patients? Isn't it ludicrous to impose maximum security confinement in a Department of Correction mental institution on *every* convict in need of mental treatment without considering, on an individual basis, whether there is need for such security?[266]

The concept of the defense of insanity is dependent on the assumption that a person who commits a criminal act while severely mentally ill is not responsible for his action and should not be punished. The Bar Association report recommends that the Department of Mental Hygiene have jurisdiction over defendants who successfully rely on that defense.[267] Examining the other side of the coin, assume a person is not "insane" at the time he commits the crime and is a

264. *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal.").

265. Bar Report, *supra* note 137, at 60 (Recommendation no. 6).

266. The New York Correction Law authorizes the confinement in Dannemora and Matteawan, of mentally ill criminals presently serving sentences, upon a judicial finding of mental illness, N.Y. Corr. Law §§ 383, 408 (McKinney 1968). Under these statutes, there is no determination of dangerous mental illness. In *Baxstrom*, the Supreme Court held that the commitment of ex-criminals to Dannemora without a judicial determination of dangerous mental illness available to all other civil patients, was arbitrarily discriminatory. Is it reasonable for the existing statutes to assume that a convict who becomes mentally ill while serving his sentence, is necessarily dangerously mentally ill? Doesn't this impart too much magic to the original imposition of a criminal sentence? The determination at time of conviction is of dangerousness, *i.e.*, guilt of a crime, not of dangerous mental illness.

The United States Supreme Court has not considered the issue of whether the penological process involved in the running of Department of Correction prisons reasonably justifies, under the existing system, the elimination of the procedural safeguard of a judicial hearing on the issue of dangerous mental illness in the transfer of mentally ill prisoners, presently serving sentences, to Department of Correction mental institutions. Unless and until the Supreme Court rules as to whether this is a reasonable basis for the classification, it cannot be said that prior to transfer into a Department of Correction mental institution, all mentally ill persons are entitled to a judicial determination of dangerous mental illness on equal protection grounds.

267. Bar Report, *supra* note 137, at 137-8 (Recommendation no. 18).

proper subject for punishment. If while he is serving a sentence in a prison, he becomes so mentally ill that he must be transferred out of the prison for purposes of treatment, why should he be disadvantaged in that treatment by the requirement of maximum security confinement in a Department of Correction institution? Why doesn't society say that due to a change in mental condition, he is no longer the person he was at the time he committed the crime, and, until his mental illness subsides, is no longer a fit subject for punishment or confinement in a maximum security institution. If Mental Hygiene is the proper department to be entrusted with treatment of persons acquitted by reason of insanity, it is also the proper department to be entrusted with the treatment of mentally ill convicts.

A similar argument can be urged in comparing treatment of persons mentally incapable of standing trial with mentally ill convicts. Neither category contains persons who are the proper objects of punishment or maximum security institutionalization. If the Department of Mental Hygiene is competent to treat one,[268] it is competent to treat the other.

In recommending that sentence-serving mentally ill convicts, as well as the other categories of mentally ill "non-criminal criminals," be considered as civil patients in all respects, the author is aware of the new problems that are created by such a solution. On June 30, 1968, there were 14,523 civil patients who had been released from institutional confinement and placed on convalescent care status, and an additional 1,961 on family care.[269] If mentally ill convicts are classified as civil patients, do they have a right to trial release? If so, should mentally ill sentence-serving convicts be released to the community or returned to the prison? If the fact of institutionalization *in a prison* was the precipitating cause of the convict's mental illness,[270] won't returning him to that same institutional environment[271] be psychiatrically harmful? If it was the fact of institutional life, in and of itself, that initially caused a convict's mental illness, should he be transferred from one institution (prison) to another (mental hospital) or should he be treated solely on an outpatient basis?

While these questions present obvious difficulties, they should not deter an attempt to institute the basic solution. Using as a guideline the goal of adequate

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268. Bar Report, *supra* note 137, at 102 (Recommendation no. 11). Unfortunately the recommendation erroneously assumed that any person who is judicially determined to be mentally incompetent to be tried is automatically civilly committable and should be hospitalized for treatment. *See* discussion in text accompanying notes 218-22, *supra*.

269. N.Y. State Dep't of Mental Hygiene, Monthly Statistical Report for June 1968 at 3.

270. Mr. Hanna, an employee of the California Medical Facility at Vacaville expressed his opinion that about 75% of the sentence-serving convicts who must be transferred out of prison for the purpose of mental treatment, are persons who have become depressed over the length of their sentences and the amount of time they have already served in prison. Statement of Mr. Hanna to Grant H. Morris, July 3, 1968.

271. Existing statutes presently provide that whenever any prisoner who was confined in Matteawan or Dannemora as a mentally ill person has *recovered* prior to the expiration of his sentence, he shall be transferred to the institution from which he came and the person in charge of such institution "shall in all respects, treat him as when originally sentenced to imprisonment." N.Y. Corr. Law §§ 386, 410 (McKinney 1968).

treatment of all patients irrespective of other status, decisions can be made implementing a rational treatment plan.

Finally, by focusing attention on the mentally ill convict, broader policy questions can be re-examined with a new perspective. Writers are continually using statistics on recidivism rates of ex-convicts to deplore the continued existence of penal institutions. A new approach would utilize the following questions: does prison life cause mental illness in a substantial number of prisoners? If so, should such confinement be eliminated as cruel punishment regardless of conviction of crime? Should society be required to seek an alternative to confinement in prison for some, if not all, prisoners? There have been recent court decisions questioning the concept of involuntary confinement of the mentally ill in mental hospitals. These attacks have been based on the inadequacy of treatment afforded,[272] and the loss of liberty involved.[273] If institutional life in itself causes or aggravates mental illness, then confinement in mental hospitals for the purpose of treatment can also be assailed on this basis.

Whether jurisdiction over all mental patients is transferred to the Department of Mental Hygiene, or whether the existing bifurcated system is retained, every patient's right to receive adequate treatment, to be spared unnecessary security controls during treatment, and to be released from unnecessarily prolonged mental institution confinement must be secured and safeguarded.

In 1965, the State of New York adopted a new system of involuntary admission of civil patients based on medical certification.[274] To protect against improper involuntary confinement, a Mental Health Information Service was created in each of the four judicial departments of the State.[275]

The recent Bar Association study recommended an extension of Mental Health Information Service responsibilities to all classifications of mental patients.[276] Since the existing segregated confinement system uses irrelevant factors to label various classifications as "dangerous" and authorizes confinement in Department of Correction institutions based on those classifications, individuals so classified are in obvious need of Mental Health Information Service assistance. If the segregated confinement system is eliminated and all persons who were previously classified as "criminal" are treated as civil patients, equal consideration would require Mental Health Information Service extension to them.

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272. Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

273. In Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966), a case involving an elderly senile person, the appellate court held that before a trial court orders involuntary institutionalization, it must first explore alternatives in an attempt to arrive at a less drastic solution.

274. N.Y. Sess. Laws 1964, ch. 738, § 5, effective September 1, 1965, repealed existing N.Y. Ment. Hy. Law § 74 (admission on court commitment) and inserted present N.Y. Ment. Law § 72 (McKinney 1968) (admission on certificate of two physicians).

275. N.Y. Ment. Hy. Law § 88 (McKinney 1968).

276. *E.g.*, Bar Report, *supra* note 137, at 2, 19-20 (Recommendation no. 1 suggested that M.H.I.S. powers and duties be extended to mentally ill prisoners under sentence.); 7 (Recommendation no. 9 called for an extension of the M.H.I.S. to defendants allegedly mentally incapable of standing trial.); 11-12 (Recommendation no. 18 advised extension of M.H.I.S. to persons acquitted of crimes by reason of insanity.).

Though Mental Health Information Service involvement with all mental patients is essential, it cannot be regarded as a panacea to the problem of securing patient's rights. As presently constituted, the Service has dual responsibilities —to assist and inform both mental patients and the courts.[277] A recent study discovered existing uncertainty as to the function of the agency and procedures to be utilized to fulfill its function.[278] For example, in staffing the four services,

> [t]he statute establishes no hiring criteria; and although salaries and titles follow civil service categories, MHIS employees have not been required to take civil service examinations. This laxity in requirements can be attributed to the legislature's inability to agree upon the precise role of the Service and its lack of experience with similar ventures. Current MHIS officers have received professional training in either law or social work. Most staff members in the First and Second Departments are lawyers, although some social workers have been employed. Conversely, former probation officers and social workers comprise the bulk of the Third and Fourth Departments' staffs.[279]

Only in the First Judicial Department have attorney personnel been permitted to act as legal counsel for mental patients. While it has been argued that by assuming this role the Service could provide greater protection for patients than they normally receive from court appointed counsel, important policy considerations in opposition to such function have been recognized.

> A Service actively representing patients may seek to persuade the court rather than to inform it; judicial confidence in the information gathered could consequently be eroded. A shift in the Service's impartial posture might also jeopardize the rapport with hospital staffs which is essential to succesful performance by the Service, for representation of patients might often bring the Service into conflict with the hospital at judicial hearings. Conversely, the desire to maintain good relations with the hospital might inhibit the Service's representation of patient's interests. And the common association between the Service officer and the hospital staff might tend to undermine the patient's confidence in his legal representation. It is not yet possible to determine whether the policy adopted by the First Judicial Department will have the effects suggested.[280]

Unless and until the role of the Mental Health Information Service as an effective patient advocate is recognized, other measures to secure patient's rights must be supported. Among the most urgent unresolved Constitutional problems concerning the commitment of mentally ill persons to Department of Correction institutions is the right to counsel.[281]

277. N.Y. Ment. Hy. Law § 88 (McKinney 1968) requires each service to inform involuntary civil patients and others interested in the patients' welfare concerning procedures for admission and retention, and to assemble and provide the court with all relevant information as to patients' cases.

278. Note, *The New York Mental Health Information Service: A New Approach to Hospitalization of the Mentally Ill*, 67 Colum. L. Rev. 672, 677 (1967).

279. *Id.* at 676-7.

280. *Id.* at 691.

281. *See generally* Lewin, *Disposition of the Irresponsible: Protection Following Com-*

The New York Court of Appeals has recently required appointment of counsel to indigent mental patients at the initial hearing brought to determine civil commitability.[282] There seems to be no justification for discriminating against those classifications of patients confined at Matteawan by denying them the right to counsel at this most essential point in the commitment process.

If mental patients have a right to counsel, there is an implicit assumption of *adequate* counsel. Other writers have noted that the average lawyer lacks expertise in dealing with mental health problems and is unwilling to pursue the investigation which is necessary in a commitment proceeding.[283] A similar failure of the bar in the criminal law area prior to *Gideon*[284] did not deter the Supreme Court from that decision. After *Gideon*, the bar responded with various programs to improve the quality and quantity of legal representation of defendants in criminal proceedings. A corresponding effort is required in the mental commitment area.

If in the future, all mental patients are treated within Department of Mental Hygiene facilities, the possibility of discrimination in availability of the Mental Health Information Service and counsel is diminished.

Finally, if the Department of Mental Hygiene acquires jurisdiction over all mental patients, the question of whether a judicial determination of dangerousness must precede a patient's transfer to a more secure ward should be resolved. Though recognizing that these security wards are functionally distinct from all others, the Bar Association stated:

> However, we consider it neither necessary nor appropriate at this time to suggest that such inter-ward movement be conditioned upon prior court approval. It appears likely that internal administrative review procedures (on either a hospital or department level) could provide the necessary protection. . . .[285]

It is submitted that such a solution offers insufficient protection against arbitrary administrative transfers of supposedly difficult patients.

APPENDIX A

The Case of Jean G.

Acquitted of the charge of murder first degree on the ground of insanity due to imbecility, this sixteen year old was committed to Matteawan by an order

mitment, 66 Mich. L. Rev. 721 (1968) for the argument that the availability of legal counsel is essential to the effective enforcement of post-commitment rights of patients committed after insanity acquittals. *See also Confusion of Confinement, supra* note 17, at 681-3.

282. People *ex rel.* Woodall v. Bigelow, 20 N.Y.2d 852, 231 N.E.2d 777, 285 N.Y.S.2d 85 (1967). Previously, the court required the appointment of counsel for indigent mental patients who sought release in habeas corpus hearings. People *ex rel.* Rogers v. Stanley, 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966).

283. Note, *The New York Mental Health Information Service: A New Approach to Hospitalization of the Mentally Ill, supra* note 278, at 689.

284. Gideon v. Wainwright, 372 U.S. 335 (1963).

285. Bar Report, *supra* note 137, at 68-9.

dated *June 1, 1914*, pursuant to New York Code of Criminal Procedure section 454. His diagnosis: Psychosis with Mental Deficiency.

After *fifty years* of confinement, he requested transfer to a civil state hospital on February 16, 1964, but was turned down after an examination on May 7, 1964. The examiner, Dr. Donald W. Cohen, stated: "Patient continues to be in need of care and treatment in a mental hospital. He impressed examiner as continuing to require controls such as are presently being provided him and which a civil mental hospital would find difficult to place into effect. His transfer is, therefore, not recommended."

Another request for transfer was made by the patient on April 18, 1965.

He was re-examined on March 28, 1966. The examiner, Arthur M. Sullivan, M.D., made these comments: "When seen today G. was in good contact, appropriate and able to discuss the situation quite well. He gives one the impression of having a significantly higher level of intellectual functioning than would be expected from his diagnosis of mental deficiency. He is well versed in current events and is able to express an opinion which is certainly better than some of those I heard expressed by other dissenters as we read in the newspapers."

In approving the transfer, Dr. L. Laramour Bryan, Assistant Commissioner of Mental Hygiene, wrote: "Transfer to a civil state hospital is approved. It is reported that this patient *does not have any history of assaultive or dangerous behavior* at Matteawan State Hospital. He is a 454 C.C.P. case and can be released only pursuant to the provisions of this order." (Emphasis added.)

On July 7, 1966, Jean G. was transferred to Kings Park State Hospital.

Comment: After fifty years of confinement at Matteawan, a request for transfer was refused. After a subsequent examination made within two years, his transfer was approved. Isn't this case, in and of itself, sufficient proof of the need for safeguards on the competence of the psychiatrists who examine patients for possible transfer, for uniform standards for those examinations, and for adequate representation of the individual patient's interests?

Also, doesn't this case contest a prevalent theory that patients who have been confined for a number of years lose contact with the outside world and acquire an "institutional psychosis" from which they cannot be rehabilitated?

APPENDIX B

The Case of Avilio M.

A memorandum in the patient's file, dated March 23, 1966 to Dr. Bryan from Mr. Drysdale gives the following account of how the patient was committed to Matteawan pursuant to Code of Criminal Procedure section 454:

On April 28, 1963, Avilio M. was arrested and charged with robbery, felonious assault, attempted rape and possession of a dangerous weapon.

He was sent to Kings County Hospital on May 20, 1963 for observation, and was thereafter committed to Matteawan State Hospital on July 30, 1963, as mentally incapable of standing trial, pursuant to section 872 of the Code of Criminal Procedure. The following diagnosis was then established: Psychosis with psychopathic personality, emotional instability, reactive features and alcoholism.

In the patient's record, dated February 7, 1964, is a note to the effect that a certificate of recovery was issued and the patient was discharged from Matteawan as "recovered" and returned to Queens City Prison. He was thereafter tried

in Queens County Court on the charges pending against him and on July 20, 1964, in a non-jury trial, was acquitted on the grounds of insanity at the time the crime was committed.

He was then committed to the custody of the Commissioner of Mental Hygiene pursuant to section 454 of the Code of Criminal Procedure, and on August 4, 1964, readmitted to Matteawan State Hospital.

Avilio was examined by Benjamin A. Schantz, M.D., on December 15, 1965, who wrote: "from all accounts, he is not a management problem. He has always been compliant and cooperative although inclined to be unsociable and with retracted interests. Although he works in the laundry detail, he hardly talks to anyone and rarely participates in ward activities. On the whole, he is described as an inconspicuous and inoffensive personality. I could determine no evidence of delusional thinking and he was not hallucinated.

"*Conclusion*: In summary we have here a youth of average intellectual potentials who is impulsive, action oriented and with strong easily aroused feelings but who is deliberately keeping his affect subdued. He lacks any sense of guilt or insight and is rather emotionally immature. The overrall picture is suggestive of what is often called a primary behavior disorder by some and adolescent psychopathy by others. This pt. has been hospitalized for only a year. I believe it would be desirable to re-evaluate his condition in another 12 months."

Dr. L. Laramour Bryan, Assistant Commissioner of Mental Hygiene, wrote: "Transfer not approved. Re-examine in one year. He reportedly assaulted another patient and struck at officers according to progress note of June 12, 1965."

In a memorandum dated March 23, 1966 to Dr. Bryan from Mr. Drysdale (*comment*: Mr. Drysdale is a senior attorney in the Office of Legal Affairs of the Department of Mental Hygiene), Mr. Drysdale wrote: "[W]here as in this case, the person is committed pursuant to Section 454 of the Code of Criminal Procedure, the psychiatric examination required is for the purpose of determining whether or not he is presently 'mentally ill' and, if so, whether he may be discharged or released on condition without danger to himself or to others. The report of such examination should set forth in detail the medical and psychiatric reasons why the person must be retained. It does not appear that the examination of this patient on December 15, 1965 was oriented to that end.

This matter was brought to our attention by Alan D. Oboler, Esq., the attorney for the patient who, naturally, feels that the patient should not be retained in Matteawan. I would, therefore, suggest that the patient be re-examined as promptly as is possible and a determination made as to whether he should be retained in Matteawan, discharged, released on condition or transferred to a civil state hospital. Whatever the determination, the reasons therefor should be fully set forth."

On March, 24, 1966, Avilio was re-examined. The examiner, V. Damijonaitis, M.D., reported: "This man who apparently is capable of becoming assaultive when under the influence of alcohol is aware of this potential of his and has shown satisfactory adjustment during this hospitalization at the Matteawan State Hospital, with the exception of his episode of assaultive behavior in June, 1965. Since that time, however, he has been cooperative, sociable, well adjusted and a satisfactory worker. He is on no medication and it is felt that at this time he could be considered a candidate for transfer to a civil hospital."

Dr. Bryan wrote: "Transfer to a civil state hospital approved."

Avilio M. was transferred to Pilgrim State Hospital on May 5, 1966.

Comment: This case illustrates the strong role a patient's attorney can play

in focusing the Department of Mental Hygiene's attention on his client and in securing his client's transfer from Matteawan.

APPENDIX C

THE CASE OF OSCAR Z.

On October 29, 1947, Oscar was indicted for the crime of grand larceny, first degree.

On December 1, 1949, the Honorable William Deckleman, Judge of the County Court, County of Sullivan, signed a document containing the following statements:

"The above named defendant, OSCAR Z., indicted for the Crime of Grand Larceny in the 1st Degree and having pled Not Guilty by reason of Insanity and having been duly tried and found Not Guilty by a July (*sic*) by Reason of Insanity *and the said Jury also having found that the discharge of the defendant would be dangerous to the Public Peace and Safety* and it further appearing that the defendant is in custody, it is,

ORDERED that the finding of the Jury, that the discharge of the defendant would be dangerous to the Public Peace and Safety, is hereby adopted and confirmed by the Court and the defendant committed to the Matteawan State Hospital, at Beacon, New York, until he shall become sane, and it is further

ORDERED that the Sheriff of Sullivan County shall forthwith convey OSCAR Z., said defendant, to said hospital aforesaid."

Comment: As discussed in footnote 229 of this paper, under the statute as it then existed, the *court*, not the jury, was supposed to determine whether discharge of the defendant would be dangerous to the public peace or safety.

On March 1, 1954, Oscar was examined by Robert C. Hunt, Assistant Commissioner. The examination disclosed that the patient had no history of violence. However, Dr. Hunt concluded: "Since the patient is in Matteawan on Section 454 of the Code of Criminal Procedure there is no legal provision under which he can be transferred to a civil state hospital."

Comment: In 1960, Section 454 of the Code of Criminal Procedure was amended (N.Y. Sess. Laws 1960, ch. 550, § 1, effective September 1, 1960). As amended, patients committed to Matteawan after an acquittal by reason of insanity could be transferred to civil state hospitals. (§ 454(6))

On February 15, 1965, Oscar wrote to the Department of Mental Hygiene requesting that he be considered for a transfer from Matteawan to a civil hospital.

There is the following notation at the bottom of that letter, written by L. Laramour Bryan, Assistant Commissioner of Mental Hygiene: "This patient was admitted to Matteawan State Hospital 9-17-49 and apparently is not eligible for transfer to a Civil State Hospital assuming that amended § 454 is not retroactive??"

Comment: The author was informed by the Counsel of the Department of Mental Hygiene that section 454 as amended in 1960 would only be applied prospectively—i.e., only to those persons committed to Matteawan pursuant to § 454 after September 1, 1960. The Department reasoned as follows: the statute as amended authorizes the court to place conditions on the discharge of a patient committed pursuant to that statute (§ 454(3)) and also empowers the court to revoke that conditional release within five years (§ 454(4)). To apply those

provisions retroactively might make the statute an unconstitutional *ex post facto* law.

Even if the Department's position was tenable as to the above statutory provisions, this does not necessarily mean that other provisions of the statute, including the provision authorizing transfer of old-law § 454 patients from Matteawan to civil hospitals, could not be applied retroactively.

As of November, 1964, there were only 5 persons (including Oscar Z.) in the Matteawan population of 1,790 who were confined pursuant to old-law § 454.

On July 16, 1965, Chapter 879 of the Laws of 1965 was enacted in New York. The statute amended N.Y. Corr. Law § 409 by authorizing the superintendent of Matteawan to discharge non-prisoner patients (except those confined as mentally incapable of standing trial) who were, in his opinion, reasonably safe to be at large. The statute also provided:

"Any such patient who has not recovered may, upon the order of the commissioner of correction with the consent of the commissioner of mental hygiene, be transferred to any appropriate mental institution in the department of mental hygiene as may be approved by the heads of such departments. All provisions of the mental hygiene law governing patients civilly admitted to institutions in the department of mental hygiene, including trial release, convalescent status and discharge, shall apply to all patients transferred to institutions in the department of mental hygiene pursuant to this section."

Prior to the enactment of this law, a Department of Mental Hygiene memorandum in support of the measure, dated May 19, 1965, contained the following paragraph:

"Finally, the bill aims at the problem of the 'forgotten patient' at Matteawan. Section 454 of the Code of Criminal Procedure was amended by L. 1960, c. 550, effective Sept. 1, 1960, to permit transfer of defendants acquitted on the ground of insanity from Matteawan to hospitals within the Department of Mental Hygiene. However, this amendment was not applied retroactively. Therefore, passage of this bill is necessary to equitably provide for the transfer of such persons who were committed to Matteawan prior to Sept. 1, 1960. The bill empowers the Commissioner of Correction, with consent of the Commissioner of Mental Hygiene to transfer these eligible patients from Matteawan's maximum security hospital to a civil state hospital where they may rightfully belong."

Comment: On September 10, 1965, the author asked Dr. Bryan whether Oscar had been placed on a list for examination for possible transfer to a civil hospital, since the new law had been effective for almost two months. The author was informed that Oscar was not on any list. Dr. Bryan stated that Oscar's name would be placed at the top of the next list which would be going out at the end of the month.

On January 17, 1966, a letter was sent by Dr. Bryan to Oscar K. Diamond, Director of Manhattan State Hospital, a civil hospital within the jurisdiction of the Department of Mental Hygiene. Dr. Bryan stated that Oscar had been approved for transfer and requested that Manhattan accept him as a patient.

On January 19, 1966, Dr. Diamond wrote Dr. Bryan saying that Manhattan would accept Oscar.

On January 21, 1966, an order of transfer was issued by the Department of Mental Hygiene.

On February 21, 1966, Oscar was transferred from Matteawan to Manhattan State Hospital.

Comment: It took over seven months from the enactment of N.Y. Sess.

Laws 1965, ch. 879 to effect a transfer of Oscar from Matteawan to a civil hospital.

On April 11, 1966, Oscar wrote the Department of Mental Hygiene seeking to be "completely discharged and released from the hospital."

On April 18, 1966, the following letter was sent to Oscar from Kenneth D. Swannie, Assistant Secretary of the Department of Mental Hygiene:

Dear Mr. Z.:

> This is in reply to your recent letter to this office requesting your discharge.
>
> I must point out to you that the doctors at the hospital decide when you are ready for release and/or discharge. I therefore suggest that you discuss this matter with your ward physician.

On May 19, 1966, Oscar signed a "voluntary application for hospitalization" form.

Comment: Is it conceivable that Oscar really desired to remain a patient at Manhattan? What does this indicate as to the administration of the statutory policy (N.Y. Ment. Hy. Law § 71(4) (McKinney 1968)) encouraging voluntary admission. The statute states that it is the duty of the director of the hospital to convert to a voluntary status, patients admitted as involuntary, whenever the patient is suitable and willing.

On May 27, 1966, a letter was sent to the Honorable Paul D. McGinnis, Commissioner of Correction, from Dr. Bryan, which contained the following paragraphs:

"In 1965, § 409 of the Correction Law was amended to permit transfer of non-prisoner patients from Matteawan to civil state hospitals, upon the order of the Commissioner of Correction with the consent of the Commissioner of Mental Hygiene. The transfer of Oscar Z. should have been effected through operation of § 409 of the Correction Law, and not through the amended provisions of § 454 of the Code of Criminal Procedure.

"Therefore, I would appreciate it if you would regularize the transfer of Oscar Z. from Matteawan State Hospital to Manhattan State Hospital by issuing the proper order of transfer and dating it, January 21, 1966."

Comment: Although the Department of Mental Hygiene had previously decided that the transfer provision of amended Code of Criminal Procedure § 454 could not be applied to patients admitted to Matteawan pursuant to § 454 prior to its amendment, and although Correction Law § 409 was amended in 1965 to specifically authorize that transfer pursuant to § 409, Oscar Z. was apparently transferred pursuant to the amended § 454.

On May 31, 1966, a letter was sent to Oscar K. Diamond, Director, Manhattan State Hospital, from Grant H. Morris, Recodification Attorney, which contained the following paragraph:

"There remains but one perplexing problem in Oscar's journey through the legal corridors. As amended, § 409 of the Correction Law states: 'All provisions of the mental hygiene law governing patients civilly admitted to institutions in the department of mental hygiene, including trial release, convalescent status and discharge, shall apply to all patients transferred to institutions in the department of mental hygiene pursuant to this section.' This statement does not require the conversion of patients transferred pursuant to § 409 to a two-physician certificate or to another admissions status of Article 5, and therefore Oscar can conceivably be retained under § 454 of the Code of Criminal Procedure. However, even if the conversion is not made, it is apparent from the above quoted

sentence that Oscar is entitled to the services of the Mental Health Information Service and periodic court review of his retention. Recognizing your genuine interest in legal issues, I feel certain that you will concur."

Comment: The above paragraph, as well as all of Appendix D, indicate the problems that can be encountered when legislation is enacted that does not clearly specify its applications and limitations. When legislation is drafted which concerns a patient classification, its prospective or retroactive applicability should be mandated.

APPENDIX D

THE CASE OF FRANK V.

In March 1924, Frank V. was charged with burglary, third degree. Schoharie County Judge Dow Beekman found the defendant to be insane and unable to stand trial and on March 28, 1924 ordered him committed.

On April 4, 1924, Frank V. was admitted to Matteawan State Hospital.

On January 12, 1965, the Department of Mental Hygiene received a ward list from Dr. Johnston, Superintendent of Matteawan. The list contained Frank V.'s name among those inmates who were to be considered by the Department of Mental Hygiene for possible transfer to a civil state hospital.

On March 18, 1965, Dr. Herman West, a supervising physchiatrist at Matteawan, examined Frank and recommended transfer if the District Attorney would drop the charges against him. Dr. L. Laramour Bryan, Assistant Commissioner approved the transfer if the indictment against Frank was dismissed.

On July 12, 1965, Matteawan wrote to Mr. Robert H. Ecker, District Attorney of Schoharie County, requesting that the indictment be dismissed so that Frank could be transferred.

On July 15, 1965, Mr. Ecker responded by letter which included the statement that "It does not appear that the case against this defendant was ever presented to a grand jury or that he was indicted."

On July 21, 1965, by the authority of § 409 of the New York Correction Law, as amended by Chapter 879 of the Laws of 1965, it was ordered that Frank be transferred from Matteawan to Binghamton State Hospital, a civil hospital within the jurisdiction of the Department of Mental Hygiene.

On July 29, 1965, Frank was transferred from Matteawan.

Comment: Frank V. was born on August 27, 1890. He was committed to Matteawan when he was 33 years old. When he was transferred from Matteawan he was 74 years old. The length of his confinement in Matteawan was 41 years, 3 months. If he had been tried in 1924 and found guilty of the crime charged, the maximum sentence that could have been imposed was 10 years.